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WILLS, EXECUTORS AND ADMINISTRATORS,

JURISDICTION AND PRACTICE

OF THE

COURTS OF PROBATE AND EQUITY,

IN RELATION TO THE

ESTATES OF DECEDENTS:

ALSO

THE LAW OF DESCENT, DISTRIBUTION, DOWER, AND
GUARDIAN AND WARD,

INCLUDING

THE STATUTES AND DECISIONS

OF THE

HIGH COURT OF ERRORS AND APPEALS OF THE STATE OF MISSISSIPPI,

AND THE

JUDICIAL DECISIONS OF OTHER STATES OF THE UNION,

ON THE SAME SUBJECT.

By JOHN M. CHILTON.

Ac mihi quidem, tamen etsi haudquaquam par gloria sequatur scriptorem et auctorem rerum, tamen in primis
ardaum, videter, res gestas scribere. SALLUST.

VICKSBURG.

PRINTED BY M. SHANNON, FOR THE AUTHOR.

1846.

Entered according to Act of Congress, in the year 1846, by
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TO THE HONORABLE WM. L. SHARKEY,

CHIEF JUSTICE

OF

THE HIGH COURT OF ERRORS AND APPEALS,

OF THE

STATE OF MISSISSIPPI;

Whose private virtues, and learning, probity, and industry on the bench, during the last fifteen years, have won for himself an enviable reputation, and for the tribunal over which he has so long presided, a character unsurpassed by that of the Judiciary of any other State in the Union—this volume is respectfully dedicated by

THE AUTHOR.

Oct. 1, 1846.

686201

PREFACE.

THIS work is presented to the Mississippi Bar, and to such public officers and private citizens as deem it not an unprofitable labor to investigate the laws which regulate the discharge of those duties that every individual may, at some time, be called on to perform,—without any other apology than the difficulty of compiling and publishing, within a period of eighteen months, daily interrupted by other engagements, a system of laws so diffuse and complicated as those which form the subject of this volume.

The author is not, however, without a hope, and even confident belief, that such as will diligently read what he has compiled, will derive aid from his labors; while, on the other hand, he is utterly regardless of the censure or criticism of those who condemn without either study or reflection.

The author claims no credit for originality; as he is well aware that the best recommendation of a legal commentary, is its close adherence to the letter and spirit of those judicial decisions by which the laws are declared and interpreted. He has also sacrificed, when necessary, every other ingredient of what is denominated “style,” to precision and brevity.

If, in some instances, he has quoted decisions which may not be considered authoritative in this State, it has been done with the view of aiding his professional brethren, by free enquiry and comparison, to form more correct and satisfactory conclusions.

If, in other instances, (as will be discovered,) a statute or decision has been omitted under its most appropriate head, it will be easily found, with the aid of the index, under some other head, "germain to the matter."

This volume has been wholly written, printed, and bound, in the State of Mississippi, and may be appealed to as a specimen of the degree of skill in the mechanical arts, which a little HOME PATRONAGE would secure to us within the limits of our own State.

The work is not, however, intended exclusively for use in this State, as it contains all the leading decisions of the Supreme Courts of other States, on the same subject.

Hoping that the contents of this volume will repay those who have encouraged its publication, or who may hereafter purchase it, the author tenders to them his respectful acknowledgments.

JNO. M. CHILTON.

VICKSBURG, MISS. *Oct. 1st, 1846.*

CONTENTS.

CHAPTER 1.	Jurisdiction of the Ecclesiastical Courts,	1
CHAPTER 2.	“ “ “	3
CHAPTER 3.	“ “ “	6
CHAPTER 4.	Jurisdiction of Equity, - - -	17
CHAPTER 5.	Practice of Probate Court, - - -	20
CHAPTER 6.	Appeal, - - -	27
CHAPTER 7.	Wills—nature and effect of, - - -	41
CHAPTER 8.	Wills—nuncupative, - - -	54
CHAPTER 9.	Codicil, - - -	59
CHAPTER 10.	Revocation of Wills, - - -	61
CHAPTER 11.	Re-publication of Wills, - - -	77
CHAPTER 12.	Foreign Wills, - - -	81
CHAPTER 13.	Who incapable of devising, - - -	87
CHAPTER 14.	Who may be Devisees, - - -	92
CHAPTER 15.	Sanity of Testator, - - -	94
“	“ what proof admissible, - - -	100
“	“ fraud, duress, or undue influence, - - -	101
“	“ what proof of fraud, &c. admissible, - - -	102
CHAPTER 16.	What embraced in a Will, - - -	104
CHAPTER 17.	Construction of Wills, - - -	107
“	“ rules of construction, - - -	117
CHAPTER 18.	Estates tail, - - -	121
CHAPTER 19.	Contingent remainder, - - -	129
CHAPTER 20.	Executory Devise, - - -	132
CHAPTER 21.	Vested remainders, - - -	134
CHAPTER 22.	Estates on condition, - - -	137
“	“ conditions precedent, - - -	138
“	“ conditions subsequent, - - -	139
“	“ effect of conditions precedent & subsequent, - - -	140
“	“ when payable, - - -	142
CHAPTER 23.	Void Devises—what, - - -	145
CHAPTER 24.	Charges on Real Estate, - - -	158
CHAPTER 25.	Trusts created by Devise, - - -	163
CHAPTER 26.	Powers created by Devise, - - -	166
CHAPTER 27.	Legacy, - - -	174
“	“ Donations, <i>causa mortis</i> , - - -	177
“	“ cumulative Legacies, - - -	178
“	“ Legacy, ademption of, - - -	180
“	“ “ in satisfaction of a debt, - - -	182
“	“ “ lapse of, 184—abatement of, - - -	187

CONTENTS.

vii

CHAPTER 27.	Legacy—assent of Executor, - - -	190
“	“ time of payment, - - -	192
“	“ interest on and profits of, - - -	193
“	“ action for, - - -	196
CHAPTER 28.	Probate of Wills, - - -	199
“	proof of lost Wills, - - -	208
CHAPTER 29.	Foreign grant of Administration, - - -	211
CHAPTER 30.	Administration, - - -	215
“	who may be Executor, - - -	216
“	Executor, how appointed, - - -	217
“	“ his refusal, - - -	218
“	“ his interest in testator's goods, - - -	222
“	Executor's interest before probate, - - -	224
CHAPTER 31.	Executor, <i>de son tort</i> , - - -	226
CHAPTER 32.	Executor, how qualified, - - -	231
CHAPTER 33.	Administrator, when and how appointed, - - -	233
CHAPTER 34.	Bond of Executors and Administrators, - - -	238
“	“ breach of, - - -	241
“	“ action on, - - -	242
CHAPTER 35.	Exec'rs. and Adm'rs., revocation of letters, - - -	245
CHAPTER 35.*	Special Administration— <i>Administrator ad colligendum</i> , - - -	249
CHAPTER 36.	Administrator, <i>cum testamento annexo</i> , - - -	251
CHAPTER 37.	Administrator, <i>de bonis non</i> , - - -	253
CHAPTER 38.	Administrator-in-chief, who qualified, - - -	257
CHAPTER 39.	Administrator-in-chief, - - -	258
CHAPTER 40.	Administrator's Inventory, - - -	259
CHAPTER 41.	Assets, - - -	265
CHAPTER 42.	Executors' and Administrators' sales, - - -	285
CHAPTER 43.	“ “ sale of personalty, - - -	303
CHAPTER 44.	Administration, authentication of debts, - - -	306
CHAPTER 45.	Administration, presentation of claims, - - -	309
CHAPTER 46.	Administration, insolvency of Estate, - - -	311
“	when Estate may be reported insolvent, - - -	315
“	notice by Commissioners—time of Com- } missioners' Report—exceptions to do. }	316
“	effect of representing Estate insolvent, - - -	317
“	remedy of creditor not exhibiting his claim, - - -	320
“	re-opening Commission, - - -	321
“	proceedings before Commissioners, - - -	322
CHAPTER 47.	Administration, payment of debts, - - -	323
“	priority of claims, - - -	ib.

*This chapter should have been 36—but in the subsequent chapters, reference is had to them as they stand.

CHAPTER 48.	Executors' and Administrators' account, -	326
"	evidence of payment, - - - -	327
"	order of payment, - - - -	328
"	what payments allowed, - - - -	329
"	what <i>not</i> allowed, - - - -	331
"	Administrator's oath and answers, -	332
"	opening and correcting annual accounts, -	ib.
"	final settlement, - - - -	333
"	effect of Decree, - - - -	334
CHAPTER 49.	Marshalling Assets, - - - -	336
CHAPTER 50.	Devastavit, - - - -	340
CHAPTER 51.	Set-off, - - - -	348
CHAPTER 52.	Compensation of Exec'rs. and Adm'rs. -	353
CHAPTER 53.	Limitation, - - - -	356
CHAPTER 54.	Interest, - - - -	360
CHAPTER 55.	Costs, when Adm'r. entitled to, - -	362
"	" " " liable for, - - - -	363
CHAPTER 56.	Adm'n.—when no ex'rs. or adm's. will qualify, -	365
CHAPTER 57.	Actions by and against Exec'rs. & Adm'rs. -	366
CHAPTER 58.	Dower—what, 372—who entitled, -	373
"	Judge Mayes' opinion, - - - -	374
"	Dower—of what, - - - -	376
"	" according to what value, - -	380
"	" how assigned, 381—how barred, -	391
"	" how relinquished, - - - -	398
"	" in personal estate, - - - -	404
"	" generally, - - - -	412
CHAPTER 59.	Descent—what, - - - -	415
"	" representation, - - - -	417
"	" collateral, 419—statute of, - -	421
"	" as between husband and wife, -	424
CHAPTER 60.	Distribution, - - - -	425
CHAPTER 61.	Partition, - - - -	434
CHAPTER 62.	Judge and Clerk of Probate Court, - -	441
CHAPTER 63.	Guardian and Ward, - - - -	466
"	bond, 483—action on bond, - - -	484
"	revocation of Guardianship, - - -	486
"	Guardian, <i>ad litem</i> —powers of Guardian, -	487
"	lease of land, 488—profits, - - -	491
"	contract by Guardian, 492—do. by infant, -	493
"	sale of property, 498—waste, - - -	499
"	Habeas corpus, 500—account, - - -	502

CHAPTER I.

JURISDICTION.

§ 1. By the Civil Law, when a legacy was bequeathed for pious uses, i. e, for the use of the church, or of the poor—the Bishops were wont to administer it. On this usage they founded a claim to intermeddle with the probate of wills, (a *temporal* authority,) and Justinian strongly inveighs against this usurpation as being both disgraceful and absurd.

§ 2. By the canon law, the Popes claimed a like prerogative, and as their influence increased, endeavored to acquire jurisdiction over testaments, and issued various decretals, tending to promote this end. Accordingly, the Bishop, in cases where a legacy was bequeathed for pious uses, and no Executor was appointed by the testament, was required to dispense the charity, or, if an Executor was appointed and the heir did not fulfil the testament within one year, the Ecclesiastical Court would compel him, even though the testament prohibited the Bishops from intermeddling. "For," as was said, "this prohibition was an immaterial part of the will, and therefore void."

But notwithstanding these encroachments, no canonist pretended to claim jurisdiction for the Ecclesiastical Courts over testaments, except such as contained provisions for pious uses.

§ 3. By virtue of several charters from the crown construed so as to suit their purpose, the Ecclesiastical Courts at length considered all testaments (which embraced only personal property) to be charitable dispositions, and henceforward began to devise a mode of publishing wills. Accordingly, when one died, they summoned the Executor or next of kin "to take care of the soul of the deceased," and compelled him to bring in the testament of the decedent, if any existed, and also an inventory of his goods and chattels. The charges were gradually multiplied and heightened so as to bring as much as possible into the

Ecclesiastical Courts, and finally by the canon of Stratford, it was decreed, that even the *residue* of the estate should be disposed of for the good of the soul of the deceased. See 1. Strange 670.

§ 4. Nevertheless the County Court continued to exercise jurisdiction in testamentary matters concurrently with the Ecclesiastical Courts—the matter of wills being acknowledged to be *mixti fori*. In order to arrest the County Courts and vest exclusive jurisdiction in the Ecclesiastical Courts, the latter induced Richard III to confirm a law of William the Conqueror declaring that “no matter of ecclesiastical jurisdiction should be transacted in the County Courts.” Henceforth (although the original law, thus *confirmed*, existed *before* the Ecclesiastical Court claimed or exercised a general jurisdiction in testamentary matters—the clergy exercised full and exclusive jurisdiction over this subject.

§ 5. The probate of testaments did not then belong to the clergy by the Ecclesiastical law, in England, but by custom and usage, established and sustained by a train of subtle contrivances and insidious encroachments, exhibiting throughout an illustration of that prudent policy, by which the Court of Rome every where established her authority—wisely yielding to princes of resolution and steadiness, but proceeding vigorously against those who had not either the sagacity to discover, nor the ability to frustrate her designs.

§ 6. In the various States of this Union the jurisdiction exercised by the Ecclesiastical Courts in England, pruned of its concomitant abuses, has been confided to a single tribunal, or divided between several, or conferred *concurrently*, to a certain extent, on both. In this work only the jurisdiction of the Court of Probate and Court of Chancery in the State of Mississippi, will be examined.*

*For decisions on this subject, in the different States, see the annexed references.

In Virginia, the Circuit Courts, and the County, and Corporation Courts, have power to hear and determine all causes, matters, suits and controversies testamentary, arising within their respective jurisdictions, and to examine and take the proof of wills, and grant certificates thereof. 3 Lomax dig. 50. The General Courts' jurisdiction in such cases is without any limit, and may in any case take proof of wills. Ibid. As to will of land, probate not necessary. 2 Rand. 190.

CHAPTER II.

§ 1. In England, matters testamentary, as the granting of the probate of wills, administration, &c., are of ecclesiastical cognizance—and in such matters the Court may proceed according to the ecclesiastical law—and their sentences shall be presumed just and agreeable to such law, though contrary to the rule and reason of the common law. 2 Bacon's abr. (ed. 1846.) Tit. Eccl. Court. D. 728. If there be *gravamen*, it must be redressed by appeal. *Ibid.* E. 732.†

In Kentucky, County Courts have exclusive, not concurrent jurisdiction, with Courts of equity, *to establish wills*, as well of real as of personal estate, and as well where the original is lost, as where produced. 9 Dana, 91. See also 6 Monroe, 527—528—5 Littel, 273.

In Massachusetts, Courts of Probate have complete jurisdiction over the probate of wills of both real and personal estate, and its decrees are conclusive on all parties. 1 Story C. C. 547—12 Mass. 525—533—534—1 Pick. 535—547—549—16 Mass. 433—441.

In Connecticut, the same system prevails. 1 Day, 170—1 Conn. 476—3 Day, 313.

And so in Rhode-Island. 1 Story, C. C. 547.

And in New-Hampshire. 8 New H. 124,

And in Ohio. 8 Ohio, 239.

In North-Carolina, its decrees are *prima facie* evidence. Taylor, 73. As to Illinois, see 6 Monroc, 527—And Alabama, 9 Peters, 174.

In New-York, the Surrogates of the several Counties have jurisdiction of wills and administration, and their decisions, as evidence, rest on the same footing with those of the Ecclesiastical Courts. 6 Cowen, 494. (The Stat. allows their registry of wills, to be only *prima facie* evidence.)

In Pennsylvania, independently of statute modifications, the Court of Surrogates, or whatever officer, coming in the place of the English Ecclesiastical Court, (and such a Court exists in every State,) has the same power as the English Ordinary in respect to wills and testaments, and their decrees are conclusive, under the same limitations. 3 Binney, 498—5 S. & R. 212—5 Rawle, 80—5 Watts, 80. See also 4 McCord, 217—1 Edward's Ch. 266—S. C. 4 Paige, 623—3 Wash. C. C. 580—1 Green, 153—10 Wheat. 465—6 Cowen, 494—1 Miller, (Lou. R.) 137—144—5 *ibid.* 387—393, on same subject.—See also next chapter.

† A Court of Chancery will interpose to arrest the proceedings of the spiritual Court, "where a prohibition lies—that is, where Courts of Chancery have jurisdiction concurrent with the latter Court, or where there is a suggestion of something that affects the rights or convenience of the parties." 3 Atk. 594—207. As where a legacy is charged on real estate—because as the jurisdiction of the spiritual Court is confined to personality, and cannot therefore order a sale of the land, the legatee would be without relief, unless Chancery would interpose. 2 Vern. 26. So, where a father institutes suit in the spiritual Court, to have a legacy to his infant (whose guardian he also is,) paid over to himself, a Court of equity will grant an injunction, notwithstanding the spiritual Court has jurisdiction of the subject, because a Court of Equity has *general care of the estate of infants*. 3 Atk. 207—1 Ch. Ca. 121. So, a Court of Chancery will enjoin husband from proceeding to recover in the spiritual Court a legacy to his wife, because the latter Court cannot make an adequate provision for the wife. Prec. in Ch. 546—1 Vern. 26. For the same reason a Court of Chancery will compel a guardian to pay interest on an infant's money, as well as give security. *Ibid.* So, a Court of Equity will take jurisdiction of bill of Executor, to compel creditors to dispute their claims,

§ 2. If the will be proved in the Ecclesiastical Court, that court has executed its authority, and the Executor must sue in the temporal courts to get in the estate of the deceased—2. Bacon's abr. 729—9. co. 38. For Ecclesiastical Courts cannot try the right of property to goods. 2. Roll. abr. 287—and a *prohibition* will be granted for such a suit—Ibid.

§ 3. But, as *incident* to their jurisdiction Ecclesiastical Courts, may determine all matters necessary to the authentication of wills. Therefore, if the seal of the ordinary appears, it cannot be proved in common law courts, that the will was forged, or that the testator was *non compos*, or that another person was Executor. For of these the ordinary had proper jurisdiction, and the only remedy was by appeal. 2 Bacon, *ubi supra*, citing Raymond 406-407; Hard. 131—2 Roll. abr. 299.

But it may be proved, in such case, that the seal was forged, or the will repealed, or that there were *bona notabilia*—because that does not contradict the *real* seal of the Court, but admits the

and right of preference. 2 Vern. 37. So, of a bill to correct a false inventory.—1 Eq. cas. abr., citing Palm. 402. See also further on this subject, 1 ch. cas. 33—1 Vernon, 106—2 *ibid.* 325.

Pending litigation of a will in the Spiritual Court, equity will enjoin payment of debts to the Executors—1 Ch. cas. 75—and appoint a receiver—6. ves. 172.

The jurisdiction of the Chancery Courts extends as well over judgments of the Spiritual Courts, as of Courts of law. 1 Ch. cases, 200.

The jurisdiction of equity is *concurrent* with that of the Ecclesiastical, in regard to legacies—where a discovery of assets is necessary, and that before the will is proved, and pending the litigation thereof—this being for the benefit of all the parties interested—and also for the preservation of the estate—and the Court, having taken jurisdiction, will proceed to decree payment of legacies, &c.—1 Vern. 106—2 Vern. 47—1 Atk. 285—Therefore legacies are suable in Equity—1 Ch. cas. 121.

A Court of Equity will pursue a decedent debtor's estate into the possession of whatever person may have obtained it. 1 Ch. cas. 57—2 Vern. 75—and decree execution of a trust arising out of will. 5 Mad. 360.

And although a Court of Equity will not examine into fraud in obtaining a will after a probate thereof in the Spiritual Court—2 Vernon, 47—Yet before probate a Court of Probate may set aside a will as well as a deed for fraud. Prec. Ch. 173. The reason is, that where the jurisdiction of the two Courts is concurrent, one will not interpose after the other is possessed of the cause. Prec. in Ch. 546—2 Vernon, 8—Ibid. 76—3 Atk. 17—4 Bro. P. C. 108.

And always in the exercise of concurrent jurisdiction, Courts of Chancery will adopt the law of the forum in which the matter was originally cognizable—and for this reason, in England, if a question arise, on the right of the legatee to demand payment, it is governed by the *civil* law, unless charged on real estate, in which case the Common law would prevail. 3 Ridge. P. C. cited in 2 Chitty's Digest, 596—3 Mad. 360—Ambl. 345.

In conclusion, it may be observed, that the general ground of *prohibition*, is—1. Defect of jurisdiction;—2. Defect in the mode of trial. See the preceding authorities.

seal and *avoids* it. Salk. 36—Vaugh. 207—Holt 305—2 Bacon, *ubi supra*.

§ 4. Notwithstanding regularly Spiritual Courts, have con-
sue of the *incidents* and *accessories* of the *principal* power,
yet, if the *incident* be merely a temporal matter, the spiritual
must proceed according to the temporal Courts, as if payment be
pleaded in bar of a legacy, and there be but one witness (which
the Ecclesiastical Court will not admit)—there, the Temporal
will *prohibit* them, because the temporal matter bars the ecclesi-
astical demand. 2 Bacon, *ubi supra*. 729—citing various decisions.

On the contrary, if there be only one witness to prove a nun-
cupative will, and the Ecclesiastical Court refuse the probate
thereof, because their law requires two witnesses to such will, a
prohibition will not lie, because there is no other mode of authen-
ticating wills except in the Spiritual Courts, and this being the
principal matter, the latter Court had cognizance thereof. *Ibid*.
Yet if a revocation of a will be proved by one witness, and the
Spiritual Court adjudges the proof insufficient, a prohibition will
lie, because the revocation of a will is a temporal matter. *Ibid*.—
citing Yelv. 92—2 Roll. 299—Carth. 143—Sid. 274.

§ 5. But the jurisdiction of the Ecclesiastical Courts, is con-
fined to wills of personalty only, and therefore if land be charged
with debts, and ordered by the will to be sold for that purpose,
and proceeds to be distributed among several persons, only a
Court of Equity can entertain a suit to enforce such direction—
because the legacy here arises originally, out of lands. *Ibid*. 730.
See 2 Vern. 26. It is otherwise, if the legacy be of a rent, for it
is a chattel. *Ibid*. Nor can the Ecclesiastical Court compel the
distribution of the residue of the decedent's estate, who has by
will devised any portion of it, for this Court only has jurisdiction
to order a distribution where the party dies intestate. *Ibid*. citing
Ld. Raym'd. 86—1 Pierre Williams, 7, S. C.—1 Eq. cas. abr. 135.

§ 6. The Ecclesiastical Courts can neither fine, imprison or
amerce—for their jurisdiction being founded on the canon or civil
law, their proceedings are only by Ecclesiastical censures. *Ibid*.
733—citing 11 co. 44 a.—4 Inst. 324—Noy 17. They can only
punish by penance and costs, which first (penance) may be com-
muted for money.—5 Mod. 70, cited in *Ibid*.

§ 7. Nor can these Courts take an obligation from one sued in them to perform the sentence of the Court, because if the matter be within its jurisdiction there are lawful means of compelling him to perform such sentence. *Ibid.* 733, citing 2 Roll. abr. 302. (But see act of 53 Geo. ch. 127—regulating Eccl. Courts.)

CHAPTER III.

§ 1. In the State of Mississippi, up to the period of the new Constitution, formed in September, 1832, the jurisdiction over testamentary matters resided in the Orphan's and County Courts; and by act of the Legislature of this State of March, 1833, all the "jurisdiction, powers, and duties," of these two Courts, were transferred to the Court of Probates. It has been decided by the Appellate Court of Mississippi that the jurisdiction possessed by the Orphan's Court in conjunction with the County Court, was *coextensive* with the jurisdiction which is now possessed by the Probate Courts under the revised Constitution. Being then conferred by law, it was perhaps *not an exclusive* jurisdiction, but it was ample, and the adjudications made by those Courts on matters testamentary are not distinguishable in effect, from those which have been made by the Probate Courts under the present system. By repeated decisions of this Court we have not only held that the Probate Courts have *exclusive* original jurisdiction in testamentary matters, but that their judgments cannot be attacked or corrected, except by appeal. Griffith's admr. *vs.* Vertner & wife—5 Howard, 739.

"It is evident that every administration must be finally settled somewhere. The very object of an administration, is to bring the whole personal estate to an adjustment preparatory to a distribution." *Ib.* See also Gildart's heirs *vs.* Starke—1 How. 450.

§ 2. It has also been decided in the case of Carmichael *vs.* Browder, that "the Constitution gives the Probate Court exclusive juris-

diction in all matters specifically set forth in the article from which it derives its powers." 3 Howard, 252. The reasoning by which the Court has supported this opinion is far from being satisfactory. It amounts to this—that the Constitution, because it gave *full* jurisdiction to Courts of Chancery, and also "jurisdiction to Courts of Probate in *all* matters testamentary and of administration," &c.—intended that such jurisdiction should be *exclusive*. But this view of the subject conflicts with a principle repeatedly recognized elsewhere, that jurisdiction is not ousted except by plain words, or by a *necessary* implication; and therefore that an act giving jurisdiction to Justices of the Peace (for example,) in cases where the debt exceeded \$100, and containing no words ousting the jurisdiction of the Supreme Court of Chancery, in like cases, the latter remained. 3 Devereux, 358—See also 5 S. & P. (Alab.) Repts. 133—1 S. Rep. 566—1 Overt. 1—3 Yeates, 479—2 S. & R. 363—8 Pick. 453—2 Rawle, 369.

§ 3. The rule of law established in the cases last cited, is directly in conflict with the decision of the High Court of this State, which has tested this question by the opposite rule, "that the grant of powers to one Court necessarily excludes them from another." 3 How. 355. But with due deference, it may be remarked, that this rule of construction is only applicable, where no words in the grant exist, either expressly, or *ex vi termini*, showing an opposite intention. Now, while in the grant of power or jurisdiction in *all* testamentary matters, &c., the word "*exclusive*" is not used, nor any other word denoting an intention to make that grant *exclusive*;—on the other hand, the Constitution says, "a separate Court of Chancery shall be established with *full* jurisdiction in *all* matters of equity." For what is meant by *full* jurisdiction in *all matters of equity*, we must necessarily refer to the Courts of Equity in England, and in our State prior to the new Constitution, and both examples will demonstrate that their jurisdiction included as "matters of equity," both concurrent and controlling jurisdiction with and over the Spiritual Courts in one case, and the "Orphan's and County Court" in the other case. If then the construction of our High Court be correct, our Superior Courts of Chancery have not "*full* jurisdiction in *all matters of equity*," but only in all "matters of equity" *except* matters testa-

mentary, of administration, guardian and ward, &c. It is humbly conceived that the framers of the Constitution would not have left so sweeping an *exception* to rest on mere implication, and thus carelessly have lopped off so many of the *essential* powers of our Court of Chancery. At all events, the presumption to the contrary, arising from the language of the Constitution by which a Court of Equity is created, is far stronger, than that, on which the decision of the High Court rests. Whether our High Court will modify or change their decision hereafter, or adhere to the salutary rule of "*Stare decisis*," and confirm by future decisions the Doctrine already established, by their opinion in the case above cited, is a question which, of course, only time can determine. The reader is referred, in connection with what has been said, to the opinion of Chancellor Buckner, overruled in 3 How. 252, as reported in 1 Freeman's Ch. Repts. 136-148.

§ 4. The Constitution of 1832 declares, that a Court of Probates shall be established, in *each* County of this State, with jurisdiction in *all* matters testamentary and of administration in *Orphan's* business and the allotment of Dower—in cases of Idiocy, Lunacy, and persons *non compos mentis*—Art. 4, Sec. 18, How. & Hutch. p. 26.

Under this clause it has been decided that the Judgment or decree of a Court of Probate in conformity to a verdict of a Jury upon an issue of *devisavit vel non*, is conclusive against all parties interested in the will. 3 Howard's Rep. 157, citing 4 Rand. R. 588—and 8 Yerger's R. 186—and 1 Starkie's E. 241—and cases there cited. But see Cowden *vs.* Cowden, 5 Sm. & M. So of every *final* judgment or decree of a Court of Probates, upon subjects confided to its jurisdiction, unless it can be impeached on the ground of fraud or collusion.* *Ibid.* 1 Howard, 450-5

*In North-Carolina, it is decided, that such decree can only be opened on the ground of newly discovered evidence. 4 Devereaux, 437. A *mistake* in the sentence of a Court. *without collusion* between the Executor and Caveater, is no reason for re-probating a will, once registered—even tho' the result would have been different had the Executor appealed. *Ibid.* 430.

In Virginia, if a will purporting to devise real estate, as well as personal, be admitted to probate by the Probate Court in general terms, the sentence of that Court will be full probate, though the will in regard to the realty was not duly executed, and if that sentence be not reversed, it is conclusive, and will be regarded a due devise of the land. 3 Lomax dig. 50—citing 1 Leigh, 287—2 Rand. 198—3 ib. 373—4 ib. 585.

Howard, 736—1 Sm. & M. ch. rep. 589—5 S. & M.—also 3 Howard's R. 252—14 S. & R. 161—184—and *ibid.* by U. S. C. Ct. 11. *Ibid.* 431—2 Wash. C. C. R. 475—4 *ibid.* 657. But the fraud must be distinctly shown, or be apparent on the face of the record. *Ibid.*

It is conclusive in all cases, where the error of the Court is only in the *manner* of exercising its jurisdiction. 2 Mass. 124—125. 7 *ib.* 83—4 Day, 215—1 *ib.* 170—1 Conn. 51—8 Verm. 365—Harper 31—1 Nott & Mc. 326—5 N. H. 246—15 Pick. 30. But it is *otherwise*, if the decree of the Court be only *incidental*. 4 Watts, 183. Nor can the truth of the records of this Court be questioned. 7 S. & R. 172—12 *ibid.* 171—4 Binn. 173. *Provided* the Court has acted within its jurisdiction. 12 S. & R. 171. But its proceedings in partition of lands, may be annulled in an action of ejectment. 6 S. & R. 271.

§ 5. It is not easy, under all circumstances, to adjust the precise line of the jurisdiction of Courts of Probate. Yet, few cases can arise in which all doubt may not be removed by the correct application of one general rule, viz: Whenever the party seeking the aid of this Court, or to be subjected to its authority, derives his, or her right or capacity from the last will and testament of a deceased testator, or by reason of the death of any person intestate, and not merely from a contract made with such testator or intestate during his life time, this Court may exercise jurisdiction—as (for example,) in case of a legatee or devisee under the will, or heir or distributee, (or the assignee of either,) in case of intestacy, or widow of either the testator or intestate whose right of dower or distribution, tho' only inchoate by marriage, is consummated by the death of her husband.

But in case of a creditor, whose interest is founded on contract, express or implied, made with the testator or intestate, during his life-time, this Court has no jurisdiction, except in rare and specified cases—which form exceptions to the general rule, and will form the subject of a future section. This general rule has been illustrated by a decision of our High Court of Appeals, in the case of Hart & wife vs. Dunbar—4 Smedes & Marsh. 273. In that case, the widow released her right of dower in her husband's lands, in order to enable the Executors to obtain a larger price.

She afterwards filed in this Court a petition to compel the heir or distributee to pay her the value of her dower so relinquished, out of the proceeds of the land. It was *held*, that the Court of Probates had no jurisdiction of such a claim, because it rested on a contract made by the widow with the Executors of her deceased husband, and not on the will or death of the latter. *Ibid.* 286. The Court further said—"there is another view presented in this case. There is a will; whether by the terms of the will and the action under it, the land was converted into personalty, and whether it does not pass as such." *Ibid.* citing 3 Leigh, 419—1 Lomax on Exec. 220. "If the will converts the land into personalty, this Court would have jurisdiction. The principle on which this doctrine depends is, that Equity considers things as done which ought to be done. Therefore if money is directed by the testator to be turned into land, or land into money, each is considered to be that species of property into which the testator directed its conversion. 3 Wheat. 577—5 Munf. 117—See also 1 Lomax on Exrs. 220"*

§ 6. Whenever the Court of Probates has jurisdiction, its decree, if final, is conclusive against all persons, whether parties to the proceedings, of full age or not. 3 Howard's R. 148—7 *ibid.* 143—2 Peters, 157—6 *ibid.* 720—14 *ibid.* 458—16 *ibid.* 71—8 Yerger's repts. 186. But see 6 S. & M.

It has been decided in No. Carolina that parties and privies are all who claim through a party, or have notice. 4 Devereaux, 437. And in Mississippi, such notice may be by actual service of process, or by publication, where the latter is authorised by statute.

§ 7. It has been observed that there are exceptions to the general rule laid down in the 5th Section of this Chapter, respecting the jurisdiction of Courts of Probate. These will be now briefly enumerated. They are few and well defined.

Creditors cannot avail themselves of the jurisdiction of this Court to compel an executor or administrator to pay them. 3 Sm.

*It is decided that a Court of Probates may compel an Administrator on a petition of stranger, to place on the Inventory, assets of the decedent. 7 Howard, 316. And so may an Adm'r. *ad colligendum*—and if in such case the defendant claim such assets as his own, he may have the benefit of an issue, to the Circuit Court, to try the right of property. *Compton & others vs. Compton*, (not reported)—by Court of Appeals in Mississippi. 6 S. & M.

& Marsh. 329—*Unless* their claims are authenticated *and* the personal estate is insufficient, *or* the estate be insolvent. *Ibid.*—But in the event either of an insufficiency of such personal estate, or insolvency, the creditor may, on due authentication of his claim, file a petition in this Court for relief. *Ibid.*

Until a report of insolvency, however, the Court of Probates has not exclusive jurisdiction of the assets in the administrator's hands; but he may, till such report, be sued in the Circuit Court, or other Courts, and the assets in his hands be reached by execution from such Court. 3 Sm. & Marsh. 454. But by a statute of Mississippi, passed 1826, if such report of insolvency be after commencement of suit, but before judgment, the plaintiff though allowed to proceed to judgment, is not allowed to have any execution thereof, but must resort to a Court of Probates. How. & Hutch. Sec. 98. 415.

In all cases of lunacy, idiocy, and persons *non compos mentis*, this Court may exercise jurisdiction, although in none of these cases, do the rights of the parties depend on the will or death of a testator or intestate—because in all of them the Constitution expressly confers jurisdiction on this Court.

§ 8. There are also several cases, in which statutes of this State authorise action by this Court, even at the instance of the creditors, and where the estate is not insolvent, nor the personalty insufficient to pay them—which cases also, apparently form exceptions to the general rule. One of these is where the Judge of Probates is authorized to issue a writ of *ne exeat*, when any person interested suggests that the administrator or executor is about to remove assets out of the State. How. & Hutch. 415. Sect.—But this is based not on any right of the Court to exercise jurisdiction of the creditor's claim, but on the power and duty of the Judge to protect the property of a decedent, and his authority over the *person* of an administrator or executor, as a *minister* of the Court. So, where a decedent, during his life-time covenanted to convey title to land, the statute directs the Judge of Probates to empower his executor or administrator to convey the legal title in conformity to the bond. But although this power is intended to consummate a contract made with the decedent during his life-time, yet as equity would have compelled the administrator or

executor, on petition of the vendee after payment of the purchase money, to convey the legal title, and as the powers of the Courts of Probate in Mississippi, are coextensive in cases of administration, with those of a Court of Equity—(see 3 Howard's R. 258, and 2 *ibid.* 856)—the exercise of such power does not seem to be in conflict with the rule, which precludes creditors from suing in Courts of Probate. Besides this—in the distribution and partition of the property of a decedent, the Probate Court would not regard the land embraced in such covenant for title, and this of itself, is tantamount to an authority to the executor or administrator to convey the legal title in conformity to the title bond.

§ 9. Where the power of the Probate Court is limited, as its power to grant letters of administration with the will annexed, (1 How. R. 330) the act of the Court must show a case which gives the Court jurisdiction, or it will be void. *Ibid.* The existence of all the facts which give the Court power to decree a sale of lands, must therefore appear affirmatively on the record of its proceedings. 6 Howard, 230—1 How. R. 379.

§ 10. Having defined and illustrated the general rule governing the jurisdiction of the Court of Probates, we will here introduce a summary of the cases, in which our High Court of Appeals has decided that this Court has *not* jurisdiction.

Courts of Probate must be confined to the powers granted, and to such *implied* powers as are necessary to the exercise of the powers granted. *Harrisons vs. Brown's heirs*—5 Sm. & Marsh.

A general creditor cannot resort to a Court of Probate, unless there be in his way some legal impediment to a suit at law, as where estate is insolvent or personalty insufficient to pay debts. 3 Sm. & Marsh. 329—*Harris & others vs. Fisher & others, admr's. &c.*—5 Sm. & Marsh.

This Court has no jurisdiction of a *devastavit* of an executor or administrator, except to refuse to allow his accounts, or to remove him. *Harris et al. vs. Brown's admr's.* 5 Sm. & Marsh.—*Stubblefield vs. M'Craven.* *Ibid.*

Nor, of a petition filed against an administrator, who was also partner of the deceased, to compel such administrator to account for the partnership effects, nor to grant an injunction prohibiting such administrator from collecting such partnership effects. The

remedy in such case, is in Chancery. Scott adm'r. *de bonis non*. vs. Searles—4 Sm. & Marsh.

But a Court of Probate may compel an administrator on petition of a stranger to place on the inventory assets of his decedent. 7 Howard, 316—Compton vs. Compton & others, 6 S. & M.

Nor can this Court entertain a petition filed by an administrator asking advice, as to distribution of funds among creditors of an insolvent estate, a portion of which creditors are Banks whose paper is at a discount. Such advisory power belongs only to a Court of Chancery. Norcom & Burwell admr's. vs. Robbins & others—4 Sm. & Marsh.

Nor can this Court entertain a Bill of review. Harris & others vs. Brow's adm'rs. 5 Sm. & Marsh. Such a Bill, in its nature, is *incompatible with the legitimate powers* of the Court of Probates. Stubblefield vs. M'Craven, 5 Sm. & Marsh.

By act of the legislature of 1846, it is enacted that the Court of Probate shall have power and they are hereby required, to entertain bills of review for the correction of any interlocutory order, or final decree of said Courts, in the same manner and according to the same rules as the same are entertained by Courts of Equity. In proceedings for the final settlement of any Executor, Administrator or Guardian, any person interested may by bill of review, open and cause to be examined by the Court any annual or partial settlement made by such executor, administrator or guardian, and surcharge or falsify the accounts rendered upon such annual or partial settlement, and persons interested may at any time, within *two years* after final settlement, by bill of review open the account of any executor, administrator or guardian, and surcharge and falsify the same and *not after*—saving to minors and *femes covert* the same time after the removal of their disability. Sec. 3d. Under the preceding decisions of our High Court, the constitutionality of this last act may perhaps be deemed questionable. This, however, will be referred to that Court, when a case shall arise, and the subject closed here by the remark, that a bill of review lies to correct a definitive decree—first, for error of law apparent on the record, but not error in the decree alone—2nd, upon discovery of new matter. Story's Eq. pl. 322. No persons except the parties and their privies in representation, can have a

bill of review. *Ib.* 325. For the general doctrine of bills of review, see Story's Eq. pl. 320 to 335.

Nor can this Court take jurisdiction of proceedings against a surety on an administrator's or other official bond, by plenary proceedings. 4 Howard, 638.

Nor enforce from legatees, on petition of the executrix, a personal demand due from them to her. 3 S. & M. 256.

Nor can this Court decide on the conflicting rights and remedies of the creditors of an estate in the course of administration before it. By Chancellor Buckner—1 Freeman's ch. repts. 509. See also, 3 How. 205; 1 Sm. & M. 527. In the same case it was decided by Chancellor Buckner, that the power of marshalling assets belongs *exclusively* to a Court of Chancery. *Ib.*

Nor can a Court of Probate grant letters of administration *with will annexed*, unless it appear that such a case has arisen as is specified in the statute authorising such letters. 1 How. 379.

This Court cannot entertain a petition of guardian appointed in another State. 2 Sm. & M. 532.

§ 11. This Court cannot exercise jurisdiction repugnant to the Constitution, even by consent of parties. 7 Howard, 329. And therefore a grant of letters testamentary or of administration, without jurisdiction, is *void*, and need not be regarded by the Court having jurisdiction, in granting other letters. 2 Leigh, 719.—See also, 1 Call, 55; 1 Const. R. 478; 1 Bibb, 263; 1 N. & M. 192; 1 Breeze, 32; 1 J. J. Marsh. 476; 3 M'Cord, 280; 6 Littel, 303; 1 Hayw. 176; 2 *ib.* 136, 176; Conf. R. 516. Nor can an agreement of parties authorise the Court to decide a case upon principles different from what the law prescribes for its decision. *Ib.* And see 4 Dever. 463. But if the Court has jurisdiction of the *subject matter*, and the *party* has some *privilege* which exempts *him* from its jurisdiction, *he may waive* this privilege. 4 M'Cord, 79; 4 Mass. 593; Peter's C. C. rep. 469; Wright, 484; 1 Breeze, 32; 2 Yerger, 441; 3 Littel, 332; 1 Call, 55; 5 Monroe, 388; Cooke, 27; Kirby, 111; 3 Rand. 394; Wright, 21, 176; Minor, 65; 4 Devereaux, 464; 3 Caine, 129.

When the subject matter is not within the jurisdiction of the Court, or where no Court in the nation has jurisdiction, an objection to jurisdiction may be taken at any stage of the proceedings.

3 Mass. 24; 1 ib. 347; 5 ib. 362; 3 Murphy, 39; 1 Root, 409; 2 Tyler, 218; Wright, 21; Minor, 64; 2 Cranch. 126; 2 Dallas, 368. So where the trial is local, or the Court has *no* common law jurisdiction, or where it has been taken away by statute without prescribing the manner in which the objection shall be taken. 3 Murphy, 39. But the objection must be apparent on the face of the record. *Ib.* In all such cases the objection may be taken under the general issue. 2 Gallis, 325. But a plea to the jurisdiction is proper, *in transitory* actions, when some Court in the nation has jurisdiction, but not the Court in which suit is brought. 3 Mass. 24; 5 ib. 362; 6 N. Hamp. 497. And the plea must show such jurisdiction in another Court. *Ib.* *

Where the court, having jurisdiction, has exercised it, and its power over the case is gone, consent of parties may restore it. Hardin, 448; 2 Wash. 213.

§ 12. As, on the one hand, consent cannot give jurisdiction to the Court of Probates, where the constitution does not confer it—So, on the other hand, a testator cannot deprive this court of jurisdiction, where the constitution confers it. Therefore, where a testator directed, that in case of any dispute, a majority of his executors, (the wife his executrix, having a voice,) shall decide it finally and conclusively, without any resort to courts of justice, the courts will construe this so as to effect the reasonable intent of the testator;—but, if any unreasonable use be made of this power, it forms a case in which the courts will interpose. Such a clause cannot prevent any party, conceiving himself injured, from submitting his case to a court of justice. 1 Peter's R. 680.

So, a prohibition of the devisees, by testator, from impleading the executors, &c., and directing that forfeiture of the devise should be the penalty for so doing, was *held*, not to prohibit devisee from drawing into examination any fraud or collusion of the executors. 5 Monroe, 246. Nor is jurisdiction taken away, by consent of parties that disputes which may arise between them shall be settled by arbitration. 6 Har. & J. 408; 1 Harring. 234; 4 Watts, 39; 1 Miles, 418; 3 Porter, 231.

* Defendant cannot plead that judge is not constitutionally a judge—because it requires a man to decide the question whether he is a judge, which he can only decide, as judge. 3 Murphy, 181. A Court can be called on to decide the extent of its jurisdiction, but not whether it be a Court. 3 Murphy, 39.

§ 13. By act § 21, ch. 39, H. & H. p. 474, it is provided that whenever there shall be so near a relation between any deceased person, and the Judge of Probate of the county in which letters testamentary or of administration have been or ought to be granted, according to the provisions of this act, *as* between father and son, by nature or marriage, or brother in like kind, or whenever a judge of Probate shall be interested in the estate of any deceased person, as being legatee, devisee or distributee, such judge shall be disqualified to act in the settlement of such deceased person's estate, and the cognizance thereof shall appertain to the Judge of Probate in an adjoining county, and who resides nearest to the residence of the judge so disqualified. And said Judge of said adjoining county shall *finally settle* the estate, and have the proceedings recorded in the Register's office of the county from which the cause was removed. So, by Sec. 26, it is provided that where the judge has been executor prior to his election, or administrator or guardian, and has not settled his accounts, he shall refer his administration to the judge of the adjoining county, as in Sec. 21, who shall in like manner have his proceedings recorded in the county from which the same is removed. H. & H. 475.

By act of 1846, approved 5th March, it is provided that "where any judge of Probates shall be related by affinity or consanguinity to any party interested in any proceeding in his court, or shall have been employed therein as counsel or attorney, it shall be his duty to transfer said proceedings to the court of Probates of some adjoining county, and the further proceedings in such case by the judge of Probates of the county to which the same shall have been transferred, shall be as valid and conclusive, as if he had original jurisdiction thereof—*Provided*, that by consent of all parties, interested in such proceedings, which consent shall be *entered on the records*, as part of the proceedings of the case, the disability of said judge from the relationship or previous employment as counsel or attorney may be waived, and his competency to try the cause be restored." Sec. 10, Act 1846.

A grant of administration, by a judge of Probates, who is a creditor, is void, although in his own mind he resolved never to enforce his claim. 21 Pickering, 101. So also would be a grant of special administration in such case. 22 Pickering, 507.

But if he relinquish the demand, he may take jurisdiction of the estate. 5 Pick. 483.

§ 14. A judge of Probate is a mere trustee of an administration bond, for all the next of kin and creditors; and he cannot submit their rights to reference or arbitration. 2 Mass. 152; 3 Mass. 235; 4 Mass. 68, 74.

§ 15. In New-York it has been decided, that the Surrogate (Judge of Probate,) has no authority, as agent of a party, to receive money, which he has decreed that another shall pay to the party; and such payment would not satisfy the decree. 6 Cowen, 494.

CHAPTER IV.

JURISDICTION OF EQUITY.

§ 1. Having, in the preceding chapters, defined the limits of the jurisdiction of the Courts of Probates, the next enquiry, in order, is—when will a Court of Equity have the right to interpose, and grant relief in controversies respecting such matters as are expressly confided by the Constitution to Courts of Probate?

It has been decided, in Mississippi, that, in regard to these matters, a court of Equity can only interpose, where the courts of Probate have not *exclusive* jurisdiction, or where the powers of the latter are inadequate to full relief.*

If the court of Probate cannot give full relief, and the party has not lost his remedy by *laches*, then a court of Equity will interpose and relieve. 3 How. R. 252; 4 ib. 455; 1 Sm. & M. 208.

A court of Equity may also entertain a bill filed by an administrator *de bonis non*, to enjoin his predecessors from collecting claims due to the estate of his intestate; for, a court of Probates cannot grant such an injunction. 5 S. & M.

*It seems the powers of the Probate court in matters committed to it, are coextensive with those of a court of Equity. 3 How. 252.

The vendee of an administrator, at private sale, acquires no right to the property sold, as against the distributee, and in such case a court of Equity will entertain a bill against the vendee of the administrator, composed with a double aspect—either to enforce the lien for the payment of the purchase money, or for the recovery of the specific property. 1 S. & M. 219—*Ib.* 221—*Aliter*, if the administrator be the only party. *Ib.*

A court of Chancery has no original jurisdiction over the subject of wills. 2 How. 806.

§ 2. In administration cases, where the court of Chancery had *original* jurisdiction, previous to our amended Constitution, that court may still take cognizance, where no letters testamentary or of administration have been granted. 4 S. & M. 707.* Therefore, where F. died in Louisiana in 1813, leaving a will in that State, and, without taking out letters of administration, the widow converted large portions thereof to her own use, a bill filed by the heirs and devisees, praying that the widow and her second husband, might be compelled to account, was *held* on demurrer, to be within the jurisdiction of the Superior Court of Chancery; but that it would have been otherwise, if letters testamentary or of administration had been granted.† *Ib.*—and authorities there cited.

§ 3. The jurisdiction of courts of Probate over wills, supersedes the jurisdiction which is exercised in the Chancery Court of England, in taking proof of wills, or in perpetuating the testimony to prove them, unless in cases peculiarly circumstanced. For most purposes, the proof may at once be offered to the court of Probates, where the will is to be established and admitted to record. But still there may be cases complicated with fraud, trust, discovery, or other principles of equitable jurisdiction, that may support an application to chancery to prove and establish the will. 3 Lomax,

*“In this case,” the court said, “we do not intend to alter any old rule, nor establish any new one.” The *reason* of the opinion is embraced in the following words of the court: “If letters had been obtained in this State, the creditors would have a remedy against the executors or administrators, in the court of Probate or other courts of law, according to the nature of the case.”

†Where different courts have concurrent jurisdiction, that before which proceedings are first instituted, and whose jurisdiction first attaches, has paramount authority, and cannot be ousted by subsequent proceedings in other courts. 16 Mass. 171; *Ibid.* 203; 1 Hawks, 78; 3 Yerger, 167; 2 Aik. 381; 9 Wheat. 532; Paine, 621; 2 Stew. & Port. 9; 5 Howard, 80.

53—citing 2 Gilm. R. 211. The same doctrine prevails in Kentucky, and in that State equity will interpose to establish a will, wherever there exists any peculiar circumstance which would defeat the object in the county court. 9 Dana, 91.

In general, Equity will not entertain jurisdiction, merely to construe a will, no other ground of equity existing. 2 M'Cord's ch. R. 26. Nor can it intermeddle with a will once admitted to probate by the court of Probate. 7 How. 143; 2 How. 806. For a court of law is as competent to *construe* wills, as a court of Equity.* 2 M'Cord's ch. R. 26. And a court of Equity has no jurisdiction to determine of the validity of a will. 7 B. & C. 437; 13 Vesey, 297; 3 Mer. 161; Jacob, 467; 4 Hag. 41.†

§ 4. An appointment by a feme covert under a power or settlement, is exclusively cognizable in a court of chancery. 1 Dev. & Bat. No. Car. R. 186.

*In *Barnesley vs. Powell*, Lord Hardwicke decided, that "there was a material difference between the court of Chancery taking on itself to set aside a will of personal estate, on account of fraud or forgery in *obtaining or making* that will, and taking from the party the *benefit* of a will established in the Ecclesiastical court, by his fraud "*not on the testator, but on the next of kin.*" The latter ground, "distinct from the will itself, and abstracted from the general jurisdiction of the Ecclesiastical court to determine of a will of personal estate," would give jurisdiction to a court of chancery, so as to compel the defendants to "consent in the Ecclesiastical court the next term, to the revocation of the will." His Lordship added—"I think I ought to go further; and altho' I shall not yet decree a trust, yet I shall even now be warranted to decree an account of the personal estate, to be paid into the bank, for the benefit of the parties entitled, as was done in the case of *Powis vs. Andrews*. This is the better method to avoid any jealousy of infringing on the Ecclesiastical court."

†A court of Probates can, on proper showing, vacate the probate of a will, and examine and decide *de novo*. 1 S. & M. ch. R. 589. Therefore according to the principle established by our High Court of Errors, (see 3 Howard, 252; 4 How. 455; 1 S. & M. 208,) a court of Equity would in such case have no jurisdiction in Mississippi. In No. Carolina the same doctrine prevails—and this even after the term of the court at which the will was proved. 1 Murphy, N. Car. R. 99.—And in So. Carolina, a successor of the judge granting the probate may revoke it. Nott & M'Cord, 326. See also 3 S. & M. 302—in which it is decided that a court of Probates may vacate a sale of land for fraud, during the same term at which it is reported.

CHAPTER V.

PRACTICE OF PROBATE COURT.

§ 1. The ordinary proceedings of the Court of Probate were conducted orally, and without any other registration thereof, than what the clerk is required by law to keep—(see sect. 20, ch. 36, How. & H. 473)—until the passage of the act of 1846, approved March 5th, by which it is enacted, that it shall be the duty of the Probate Judges to keep in their courts respectively, a docket-book of all cases, pending in their courts, on which docket shall be entered, in the order in which they are made, all applications for letters testamentary, of administration and guardianship, and all other suits or causes in said courts, whether by bill, petition or motion, and whether the same be *ex parte*, or between two or more persons litigant in said courts; and at each term of said courts, it shall be the duty of the judge thereof, to take up and dispose of the business, pending between them, in the order in which the same is entered upon their dockets. Sec. 1 of act of 1846. And by section 10th of same act, it is provided, that where the judge is disqualified from acting, by affinity or consanguinity, or has been counsel or attorney, and the parties *consent* that he shall try the cause, such consent *shall be entered of record*, as *part* of the proceedings in the case, and thereupon the disability of the judge shall be waived, and his competency restored.

In proceedings in the Orphan's court, on settlement of estates, such entries should be made as to show, at whose instance settlements are ordered, what representatives appear, who claim under the decedent, and who are actors in the cause. 4 Por. (Ala.) rep. 332.

A court of Probate ought to keep a perfect record of all its orders and decrees; and orders of notice, among other things should either be recorded or be filed, with the return upon them; and in all important decrees, if previous notice have been made, the fact should be recited in the decree. 14 Mass. 222, 226.

§ 2. By another statute, (How. & H. sec. 17, ch. 36, p. 472,) it is provided, that whenever either of the parties, having a contest in the Orphan's court, shall require, the said court may direct

plenary proceedings, by bill or petition, to which there shall be an answer on oath, (or affirmation;) and if the party refuse to answer on oath, (or affirmation, as the case may require,) to any matter alleged in the bill or petition, and proper for the court to decide upon, the said party may be attached, fined and committed at the discretion of the court, and the matters set forth in said bill or petition, shall be taken *pro confesso*, and decreed accordingly.* (See sec. 10, *post*.)

§ 3. The bill or petition, authorized by the foregoing statute, should consist of a logical statement or narration of the facts on which the petitioner rests his claim to the decree or order of the court which he prays for; and in this, as well as in other respects, it should conform to a bill in chancery, avoiding however, all the features of the latter, which are merely formal. The court should be cautious not to exclude matter *essential* to a due decision, nor allow proceedings to be spun out into unnecessary length; but in case of serious doubt, as to the ultimate effect of any averment, it should be admitted. 5 Eng. Eccl. R. 120. In a testamentary suit a variety of slight circumstances are pleadable, where the case is one involving a question of fraud. 2 ib. 131. For wherever fraud is charged, the court will allow a greater latitude of pleading than in ordinary cases; but even then, *remote* facts must not be as minutely stated, as those which bear directly on the point at issue. 3 ib. 61. Minute facts should not be pleaded, but properly fall within evidence. Ib. 329.

While on the one hand, it is desirable to compress allegations into the narrowest possible compass within which all relevant facts can be fairly and adequately stated, especially in cases involving necessarily a great quantity of matter; 2 Eng. Eccl. rep. 134;—so, on the other hand, the whole substantive case of the party should be brought before the court at once. Yet, when it is clearly shown, that the facts could not have been pleaded sooner, additional articles may be given in. 5 ib. 28.

*All courts of record have a right to make rules for the regulation of their practice, not in violation of the laws of the land, and they are the most proper judges of the extent and application of their own rules. 8 S. & R. 336. Old rules of practice consonant to reason and analogy, and having undergone no authoritative alteration, ought to govern the practice of courts at the present day. 2 Eng. Eccl. R. 47.

§ 4. A petition to the court of Probates must not be multifarious, nor incongruous, nor informal, nor defective. 1 How. 380; 3 S. & M. 256.

But a bill or petition is not multifarious, if filed with a double aspect—as, for the enforcement of a supposed lien, or a recovery of the specific property. 1 S. & M. 208; Ibid. 221. A bill for partition of real estate, and for distribution of personal estate, in the hands of an administrator by a co-heir, is bad for multifariousness, as uniting several matters of distinct natures. 1 How. R. 380. A petition for administration *pendente lite*, must set forth a special cause for granting it. 5 Eng. Eccl. rep. 365. So, a petition, for the sale of particular property and distribution of the proceeds, by a legatee, must state the condition of the estate to be distributed, and show the character of the rest of the estate—otherwise it will be too vague. 2 S. & M. 30. And all claimants must be made parties. Ibid.; 7 Howard, 106.

§ 5. Unconnected parties, if having a common interest centering in the point at issue, may join in the same bill in chancery. 1 S. & M. 483. And, the same rule, it is presumed, should prevail in a court of Probates.

A motion to revoke letters of administration, because the administrator is not next of kin, can be made only at the instance of the next of kin. 1 How. 322.

In a controversy between the administrator and the distributees, the court cannot take notice of, nor act upon the rights of creditors, not parties to the suit. 1 S. & M. 546.

§ 6. By act of 1846, sect. 4, it is provided—that no order or decree, affecting the right or interests of any *minor*, shall be valid and binding on said minor, or his or her interest in any estate, administered in any court of Probate, within this State, *unless* his or her guardian (if a resident of the county in which the proceedings are had,) shall be first *personally* served with five days notice, to appear and defend the rights of the said minor; or if the guardian of such minor be not resident of this State, and do not appear, or if the guardian whether resident or not of the county, be a party *personally* interested, to give validity and effect to any such order and decree, the court shall appoint a guardian *ad litem*, to protect the interest of such minor. Sec. 4, of act of March 5, 1846.

It is competent for the law to prescribe the mode of bringing the parties into court, and it may either be done by *service* of process, or by publication of notice. 5 How. 736. The latter is constructive notice sufficient to put parties interested on their guard. Ibid. 740.

By act of 1846, sec. 12, it is provided, that on an executor's rendering a *final* account, citations shall issue *to be served* on parties resident in the county where the court sits; and where the parties interested are *non-residents* of the State, and beyond its jurisdiction, upon affidavit of such fact, the court shall order publication, in some newspaper, citing such absent parties to appear on a day certain not less than 60 days after the first insertion of such notice, to show cause why such account should not be allowed.

§ 7. On a motion for distribution of an estate, a *pro confesso* against the administrator of the *first* administrator, does not affect the rights of the heirs. 7 How. 106. The former does not represent the intestate of the latter. *Ibid.* And the intestate's administrator, in every case where distribution is sought, has been held to be a necessary party. *Ib.* 111—citing 1 Paige 270; 6 Rand. 448; 2 M'Cord's ch. R. 168; 1 Paige 166; 4 John. ch. repts. 199. So far does this rule extend, that distributees cannot sue an executor *de son tort*, without having an administrator *de bonis non*, as a party, because a recovery by the distributees would leave him still liable to the demand of the administrator *de bonis non*. *Ib.*—citing 2 Leigh, 649.

§ 8. By section 18, of chapter 36, How. & Hutch. 472, it is further provided, that upon such plenary proceeding, all the depositions shall be taken and recorded, and in case either party shall require, the court shall direct an issue to be made up and sent to the circuit court of the same county, and the said issue or issues shall be tried in the said circuit court as soon as may be, without any continuance longer than is necessary to procure the attendance of a witness or witnesses. And the power of said court, and the proceedings relative thereto, shall be, as in other cases, respecting the trial of issues. But the Orphan's court shall give judgment and decree upon the bill and answer, or upon the bill, answer, depositions, or finding of the jury;—and in all cases of contest, the Orphan's court may award *costs* to the party in their

opinion entitled thereto, and may compel payment by attachment of the body, or of the goods and chattels of the party against whom such costs shall be awarded.

§ 9. Although, by the foregoing statute, the Judge of Probate is required, upon the requisition of either party, to refer an issue to the circuit court, yet the facts *may be* ascertained, if necessary, in the Orphan's court, by a jury. 1 Binney, 364. Such issues are no new things, but often allowed in case of wills. 5 Serj. & Rawl. 146; 3 Penna. 185. But it cannot delegate its jurisdiction in matters depending on both law and fact.* *Ibid.*

When an issue is referred to the circuit court, if the circuit court render a judgment, it is a nullity. The circuit court can only certify the verdict of the jury to the court of Probates, that judgment may be rendered thereon in the latter court. And an application for a new trial must be made in the latter court, after certifying such verdict. 2 Paige, 487; 3 Con. Eng. ch. rep. 63; 2 Rob. Prac. 356. If refused there, and the case finally disposed of, the whole proceeding may be brought up to the court of Errors. Wallace & others *vs.* Wingate's adm'r., Jan. term, 1846, of High Ct. of Err. & App. of Miss.—6 S. & M.

One administrator, *ad colligendum*, may compel his co-administrator to place on the inventory the assets of the decedent, and if the defendant claim them as his own, he may have the benefit of an issue to the circuit court, to try the right of property.—Compton *vs.* Compton & others—Jan. term of Ct. of Err. & App. 1846. *Ibid.*

§ 10. By act of 1846, March 5, sec. 2, it is provided, that in all cases in which any court of Probate shall make and enter a judgment and decree against any party litigant therein, or against any executor, administrator, or guardian, for payment of a sum of money by said party litigant, executor, administrator, or guardian, to any other party entitled to the same, by the terms of said judgment or decree, said court shall have power to force a compliance

*The same precision and minuteness ought to be observed in framing issues directed by this court to settle an administration account, which are required in forming an issue before auditors, in an action of account rendered. 3 Penn. 208. (Whether the court of Probates can, in Mississippi, direct an issue to be tried by a jury in said court—and in what cases—*Query?* See 6 S. & M. and 5 ib.)

with the terms of said judgment, or decree, by process of *feri facias*, issued by said court, returnable to a term of said court, not less than *six* nor more than *eight* months from the *teste* of said writ, which process shall be executed by the sheriff of the proper county, upon the lands and tenements, goods and chattels of the party against whom the same shall issue; or, by process of attachment against the *person* of the party against whom the judgment or decree shall have been rendered: *Provided*, that no such attachment shall issue, until the party against whom the same is prayed, shall have been cited to appear, at some *regular* term of the court, to show cause why it should not issue; and if, upon the service of the citation, the party shall fail to appear, or shall not show good cause against the issuing of the attachment, the court shall issue a *peremptory* attachment, commanding the sheriff to imprison the person or persons of the party, until he or they shall comply with the judgment or decree of the court. See sec. 1, *ante*.

§ 11. The course of proceeding prescribed by the foregoing statutes, for courts of Probate, is analagous to that which prevails in our courts of Equity; and in most instances the rules established in the latter courts may, whenever applicable, be safely adopted in the courts of Probate.

In the case of *Cowden vs. Dobyne & wife*, our court of Appeals decided that, "in the absence of statutory directions, the mode of proceeding adopted by the Ecclesiastical courts of England are *necessarily* in force, in our Probate courts." 5 S. & M.

The precedents afforded by the Ecclesiastical reports, are so meagre and unsatisfactory, as, in few instances, to afford any guide; but as they conformed, in their practice, very closely to the courts of Equity, this defect, in all cases, where no positive precedent, derived from the Ecclesiastical courts, exists, may be remedied by a resort to the admirably digested system of pleading and practice which obtains in the courts of Chancery. It is, however, much to be apprehended that the amalgamation by our Constitution, (as construed by our High Court,) in the courts of Probate, of powers which formerly belonged to two distinct tribunals, both in England and the United States, without the adoption of the rules of practice belonging to either, will lead to much perplexity. In

the words of Judge Gaston, of North-Carolina, "the profession is necessarily driven to adopt some mode which is, at the same time, analagous to the established usages, before these changes were made, and reconcilable to the state of things induced by them. This adaptation of old forms to new laws is among the most delicate and difficult of legal labors. It has not yet been successfully effected upon this subject, and there is reason to fear, that several adjudications must be had, before it can be completely accomplished.*

The writer will not attempt to solve these doubts by any theory on this subject; but as this work is intended to present only such principles as are well established, and not to discuss those which are *mooted*, he will confine himself to the task, (in addition to what has already been presented in the preceding sections,) of collecting and arranging, under appropriate heads, in the subsequent pages of this volume, such adjudications of the English Courts, ecclesiastical and temporal, and of the Courts of the United States, as are relevant to the subjects under consideration.

§ 12. The same rules of evidence and of property which are binding on courts of common law, are equally binding on a court of Probates, except where different rules are provided by statute. † 15 Mass. 307.

*In Pennsylvania, the principles of equity govern proceedings in the Orphan's court, and the court may require an accountant to render his statement on oath. 15 S. & R. 66.

In New-York, parole evidence is admissible to show the regularity of proceedings for the sale of an intestate's estate, where it appears that the records and papers of the court, pending the proceedings, were not properly kept; and the presumption is thus raised that the papers of the office may have been lost. 12 Wendel, 533.

†The foregoing chapters on the practice of the Probate Courts, have been intended only to illustrate *general rules*;—the *details* will be more fully considered hereafter, in connection with the various objects which they are designed to accomplish, and under appropriate titles.

CHAPTER VI.

APPEAL.

§ 1. Any person who may conceive himself or herself aggrieved by any judgment, decree or order of the Probate court, shall have the liberty of appealing to the court of Chancery,* or Supreme court of this State, upon the appellants giving bond with good and sufficient security, approved by said court, and in such security and in such sum as they shall direct, to the Judge thereof, conditioned, that the appellant shall prosecute the said appeal to effect, and perform the sentence, judgment or decree, which the said court of Chancery or Supreme court, shall make therein, in case the cause be decided against him or her; which bond may be put in suit, in the name of said Judge of Probate, and the amount received thereon applied as the said Probate court shall direct among those injured by breach of the condition thereof.— If the judgment, decree or decision, or order, of the Probate court shall have been given or made on a summary proceeding, and on the testimony of witnesses, the party shall not be allowed to appeal, unless he or she shall immediately notify his or her intention or request, that the testimony be reduced to writing. And in such case, the deposition shall be at the cost of the party in the first instance, reduced to writing, and the transcript of the whole pro-

*So much of the above act as provides for an appeal to the Superior Court of Chancery, is virtually repealed by the act of 1844, chap. 7, sec. 1, page 95—and it is further enacted that no appeal shall be allowed to any other court, except the High court of Errors and Appeals. (See same act, sec. 1.)

It is further enacted, that any person or persons *feeling* himself or themselves *aggrieved* by *any* judgment, decree, or *final* order, of any Probate court, shall be entitled to an appeal to said court of Errors and Appeals, as a matter of right, (see 1 S. & M. 579, on stat. of 1837,) at any time within *sixty* days after the passing of any such judgment, decree, or *final* order, on *petition* therefor to the clerk of said Probate court: *Provided*, that such appeal shall not operate as a stay of further proceedings under such judgment, decree or final order, *unless* the appellant shall give bond, with surety to be approved of by the Judge of said Probate court, in accordance with said provisions of the said 20th section of the above mentioned act. Sec. 2, of act 1844, ch. 7. By the 3d section of the same act it is further provided, that “the High court of Errors and Appeals, or any Judge thereof, *in vacation* may, on petition of any party to any judgment, decree or *final* order, unless the appellant shall give bond with sureties to be approved by the Judge of said Probate court, in such penalty as the said High court of Errors, or Judge granting such appeal, shall prescribe, conditioned as required by the 20th section of the above recited act. (See sec. 9, *supra*.)

ceeding relating immediately to the matter, shall be made out by the register of said court, and certified by him under seal, and transmitted to the said Appellate court, by the party, within 30 days from the date of the decision or the order—otherwise the said party shall lose the privilege of appeal.* Sec.20, H.& H. 473.

And if the decision of the Probate court be in a summary way and on papers filed in the court, no party shall be entitled to appeal, unless he or she enters an appeal within three days, and transmit a certified copy of the proceedings as aforesaid within 30 days aforesaid. But in case there shall have been plenary proceedings as aforesaid, (see ch.5, sec.2) either party may prosecute the appeal by entering the same as aforesaid, and by transmitting a certified copy as aforesaid, within 60 days after the decision, judgment, decree, or order; and in the said Appellate court the decree so carried up shall stand for hearing or decision at the term next succeeding the transmission of the proceedings. And the said court shall, at the said term, or as soon as conveniently may be, either *affirm* the decree, judgment, decision, or order of the court below, or direct in what manner it shall be changed or amended; or may at their discretion direct an issue or issues in fact to be made up and tried by the Circuit or Superior court of the proper county, as in other cases.† And when the decision of such Appellate court, shall be certified under the seal, by the clerk of such court, and transmitted to the Probate court, the said Probate court shall proceed according to the tenor and directions thereof, and the same shall be final and conclusive between the parties. How. & H. p.473, sec.20, ch.39. ‡

*The regular mode of removing a record of the Orphan's court is by *certiorari*, and nothing else can stay the proceedings below. 2 Dallas, 190.

† When the High court of Err. and App. shall affirm any judgment, *final* order or decree of any Probate court, for the payment of money, it shall be the duty of said High court of Err. and Appeals to *render judgment vs. the appellant and sureties*, if any be given for the amount of money due on such judgment, *final* order or decree, at the rate of ten per cent. until the same be paid. Sec.4, ch.7, act of 1844.

‡ By act of May, 1837, (called session,) it is enacted that, "when any party, plaintiff to any judgment or decree, rendered in *any* court of this State, shall desire to have such judgment or decree reviewed by the High court of Errors and Appeals, he, she, or they, may apply by petition to the clerk of the court, where such judgment or decree was made or rendered, for the issuance of a writ of error; which writ of error it shall be the duty of such clerk to issue, to operate as a *super-*

§ 2. The result of a full comparison of the foregoing statutes, in relation to an appeal from a judgment, decree, or order of the court of Probates, may be summed up in the following rules:

I. The party desirous of appealing must be *aggrieved* by the judgment, decree, or final order of the court of Probates. 7 How. 106.

If a judgment be for the *benefit* of a party, he cannot appeal—as where assumpsit was brought against executors for money had and received for plaintiffs by defendants, and not by the testator, on plea of *non assumpsit*, the verdict was, that “defendant did assume,” &c., and judgment *de bonis testatoris*, was erroneously rendered. This being for the *benefit* of the defendants, and the plaintiff not being dissatisfied, the defendants were not allowed to object to its being so entered. 2 Call. 514.

An administrator may appeal from a decree of distribution, though not a party aggrieved within the meaning of the act. 4 Rawle, 268.

And if one of two executors direct an appeal, writ of error or supersedeas, originally granted to both, to be dismissed, the other may proceed without him; and *both* being before the court, an order of severance may be made without a summons. 4 Henn. & Munf. 283.

The creditor of a spendthrift may appeal from a refusal of a judge of Probate to order the guardian’s bond to be put in suit. 21 Pick. 36.—citing 16 Mass. 524, and 5 Pick. 61. (But in Miss. no order being necessary, it would be otherwise; See *post*.)

A person appearing as attorney in fact for creditors, may appeal, though not interested in the subject of controversy; 4 Munf. 403.

sedeas, the petitioner or petitioners giving bond with two or more good and sufficient securities, to be approved of by said court, conditioned in the manner now prescribed by law. And said clerk shall thereupon issue a citation to the adverse party, directed and returnable in the manner now prescribed by law.” The same act provides that “the security taken, may be excepted to *in vacation*, before any Judge of the High court, and if such exceptions be sustained, and the security be not immediately made sufficient, the writ shall cease to operate as a stay of further proceedings.” The phraseology of the above recited act of 1837, is sufficiently broad and general to include a judgment or decree rendered in the court of Probates; but if so, the plaintiff or defendant desiring to avail himself of its benefits, must do so subject to the conditions of the act of 1844, *expressly relating* to judgments and decrees in the court of Probates—and some of the provisions of which are directly in conflict with the act of 1837.

But in general, none but a party having an interest in the subject can appeal. Therefore an uncle or next friend of a *non compos*, cannot, *as such*, appeal from an allowance of the guardian's account. To entitle either of them, he must show *that he has an interest*. 2 Mass. 140. Therefore, the executor or administrator, in whom the legal title to the personal property of the decedent has vested, and not the heir, must appeal from any judgment affecting it. 2 Mass. 140; 9 ib. 386; 2 Root, 219; 4 Pick. 441.

But the children of a *non compos*, being *presumptive heirs*, may appeal—18 Pick. 1—because no other person, having an interest, is competent to appeal. *Ibid*.

But a person under guardianship as *non compos*, may petition to set aside the letters of guardianship, and appeal from a decree rejecting such a petition. 1 Mass. 543. The law contemplates a time when such person may be restored to his reason, and his property; and he should not be left to friends, who through ignorance, or inattention, might leave him in bondage, *forever*. *Ib*.

A widow, having a greater interest in the personal, than in the real estate, of her deceased husband, may appeal from a decree charging certain sums on the personalty, that ought to be charged on the realty. 18 Pick. 285, and 4 ib. 33. And where intestate left a widow and child, and child died, and a creditor of the father was made administrator, it was held, that the widow, as the child's mother and heir, was the only person interested. 4 Pick. 41, note. None but a party having a right to administration can appeal from a decree granting letters of administration to another. 4 Dev. 168.*

A trustee, summoned *as such*, may appeal. 8 Pick. 401, 405; 10 ib. 34, 440; 1 ib. 461.

A creditor of the heir, *if he has attached his interest*, may appeal from the allowance of a will devising the real estate; but not otherwise. 16 Pick. 264.

A creditor of a decedent testate or intestate, or of a devisee, *if his debt survives*, has sufficient interest that administration should be granted, to litigate that question. 1 Pick. 71; 4 ib. 33.

*In Missouri, any person "interested and aggrieved," is entitled to an appeal, but if his interest is not direct, it must appear clearly on the record that he is interested." 3 Miss. R. 269.

But a mere *debtor* to such decedent has not. 3 ib. 443. For, if one debtor could so litigate, all could, and it would be too inconvenient. *Ibid.*

No appeal lies for a creditor, whose claim has been disallowed, by commissioners on an insolvent estate. 2 Root, 297; see also 4 S. & M. 691.

In a contest about a will, a person, who was not a party in the county court, may by becoming interested *after* an appeal to the District court, be admitted, as a party there, and carry up the cause to the court of Appeals; but on reversing the judgment such party can recover only the costs of the court above. 2 Henn. & Munf. 467.

On an appeal, from a sentence disallowing a will, the court above will not allow a legatee to be substituted as appellant for the executor, who propounded the will, in order to get the benefit of the executor's testimony. 1 Paige, 550.

No allowance of the court below is necessary to the validity of an appeal; but some action on it, subject to revision will often be necessary. 18 Pick. 1; 22 ib. 11, 12, 13; 4 Mass. 107, 108.

II. The proper place for showing the interest of the appellant, is on the motion for appeal. 4 Day, 137. (In Mass. the claim of appeal may be *oral*. 4 Mass. 460.)

Objections must be taken to the pleadings in the Probate court, *before* trial of the merits, or the Appellate court will not enquire into their regularity. 3 How. 360.

The filing of reasons, where the claim of appeal is allowed to be *oral*, within the time limited for appeal, will be sufficient. 4 Mass. 460. (In Mississippi, a *petition* is required. Act of 1844, ch. 7, sec. 2.)

The day of claiming the appeal is to be reckoned as one of the term of limitation. 4 Pick. 167; 2 Watts, 283.

After trial of the cause on the merits, the court will presume the appeal was in time. 2 Day, 12.

III. The record must show, when sent up, that the party appealed. 2 Fairf. 247; 1 Overt. 313.

And, it must also show, that the court had jurisdiction, by process served, or publication where publication is authorised. 1 S. & M. 351—If not, the judgment is a nullity. *Ibid.*

The record must also show a judgment below, to give the Appellate court jurisdiction—3 How. 172—and must show a case sufficiently certain, to enable the High court to act on it. 1 How. 21. (Whether High court can act on a case sent up on doubts, see *ib.*)

When the record is silent as to the action of the court below the presumption is that the court below acted correctly. 1 S. & M. 321; 3 *ib.* 305. Where it sets out the evidence, it must justify the judgment. The judgment of every court, of competent jurisdiction, must be holden to be correct, unless the error is made manifest by the record. 1 How. 162. When a motion, required to be sustained by evidence, is overruled by an inferior court, the record must show that the evidence adduced was embodied in a bill of exceptions. *Ib.* (Where a bill of exceptions is not required, the record must contain the evidence.)

IV. The appeal must be entered above, at the next term of the Appellate court—6 Mass. 379—and a copy of the record must be filed on the first day of the term to which the writ is returnable; 2 S. & M. 443—if not, on the defendants in error docketing the case, it will be dismissed. *Ibid.*

And a motion to docket the cause and dismiss the appeal, by appellee, will be sustained, on a copy of the decree below and certificate of appeal. A complete record is not necessary to sustain such motion. 2 Rand. 109.

But, where an appeal bond was returnable at the December term of the court of Appeals, but the record was not filed till the third day of the January term, the court overruled the motion to dismiss *after the record had been filed*. 2 How. 817. The statute (10th sec. Supreme court law, rev'd. code, 151) providing for dismissal is not peremptory, unless the party moving to dismiss has complied with all its provisions. *Ibid.*

If a party dies after an appeal, and before a return term, his representatives are entitled to revive, and a motion to dismiss, for want of assignment of error, will not be granted, in such case. 2 How. 817.

But, where appellee died *after* appeal, his administrator may have appeal dismissed without *scire facias*, it appearing from the entry, that motion was made by the administrator. 1 Hen. and Munf. 339.

But in such case the court will not always dismiss an appeal, for failure to deliver the record, during, or before second term. 3 Henn. & Munf. 269.

If accident or mistake prevent entry of the appeal at the next term, the petition asking leave to enter it at a subsequent term, must expressly state what the accident or mistake was. 1 Mass. 230.

V. The appellant must execute bond.

The bond executed by appellant on an appeal from the court of Probates, must be payable to the Judge of Probates, and not to the adverse party. 4 S. & M. 99; 9 Conn. 388. But now by act of 1846, sec. 15, it is provided that such bond may be made payable either to the Judge of Probate, or to the adverse party.

A bond executed by the surety and not by the principal, is insufficient. 4 Munf. 323, 104. So, a bond executed by a stranger is insufficient. 1 S. & M. 657; 16 Pick. 203. An appeal can be granted only during the term at which judgment was pronounced in court; and court cannot allow an appeal during *term time*, on condition of bond being given after the term. 1 How. 267; 4 Rand. 460; 6 Munf. 397.

The execution of an appeal bond is a condition precedent to the jurisdiction of the Appellate court. 1 S. & M. 657. But in Mississippi it is matter of right, and bond is only requisite to operate *supersedeas*. See act 1844, ch. 7, sec. 2.

It must be executed in court, and cannot be approved in vacation—1 How. 267—and the court cannot delegate to the clerk, or any other person, the power to approve the bond. *Ib.*—And the appeal bond must be approved by the court, as well as the security; and where the court only approved the security and authorised the bond to be given at any time within thirty days, it was held insufficient. 3 How. 75. But where the court gave twenty days to execute an appeal bond, and the party gave it in *two* days, during the session of the court, and the security was approved by the court, and it appeared on the record as part of the proceedings, the appeal was sustained. 3 How. 84. But see act of 1844, ch. 7, sec. 1, p. 95.

Appeal bonds can only be attacked for errors on their face, or non conformity to law. They will be presumed to have been executed by the parties whose names appear to them; and if executed by an attorney, the presumption holds equally good. 2 How. 817.

An appeal bond must be in the name of all the parties, against whom the judgment or decree was rendered. If some of the parties will not join in the appeal, any one who may desire a revision of the judgment may proceed, by summons and severance, on his case only, and exempt himself from any eventual liability for the others. 3 How. 43.

And if it appear from the record, that all the parties prayed the appeal, it will be sufficient under the statute, though one of them, only, executed the bond. 5 How. 638; 7 Cowen, 428. It may be executed by the real as well as the nominal party. 8 Cow. 119.

Executor and administrators, *as such*, are not bound to give the appeal bond, required by the general statute. There is a statute which exonerates all executors and administrators from liability beyond the assets of the estate. (H. & H. sec. 38, ch. 36, p. 396.) They are not liable to pay costs against the estate out of their own funds. To require them to give bond with surety, upon an appeal taken by them, would frequently lead to a personal decree against them, and thereby contravene the express provisions of the last named statute. An implied repeal of a statute will not be sanctioned, unless it be clearly in conflict with another. In this instance, both statutes can have their full effect, by holding, that the one operates as an exception to the general rule created by the other, and that executors and administrators, *as such*, are not bound to give an appeal bond. In this, we do not claim any right to create exceptions to the terms of a statute, but only by a fair exposition to give efficacy to an exception created by the law itself. A similar construction has been adopted in several of our sister States. 3 Rand. 1. But there, they met the rule, on the ground that the executor had already given bond to administer the estate according to law; and they hold that a remedy exists on that bond, if the cost be not paid, and there are assets for that purpose, 1 S. & M. 590; 3 Leigh, 196.

And, upon the same principle, it has been decided, that an appellee cannot object to a bond executed by applicant and docketed without objection, after the death of the latter; because as an administrator would, if such objection were allowed, be compelled either to give bond, which he is not bound to do, or be deprived of his appellate rights, no such step should be taken for dismissal. 3 Leigh, 196.

So, a person under guardianship, as *non compos mentis*, need not give a bond to prosecute his appeal from a refusal to revoke letters of guardianship. 1 Mass. 543. Because, having been adjudged *non compos*, his bond would be a void act. It is also unnecessary: For either the letters of guardianship will be repealed, and the appellees entitled to no costs, (in which event the bond would be unnecessary,) or the guardianship will be confirmed by the dismissal of the petition, and that because the appellant is decided to be *non compos mentis*—and then his bond would be void;—to which may be added, that the whole estate of the appellant is in the hands of the appellees, and they will, if their guardianship continue, be able to pay themselves. *Ib.* 547.

A party becoming *non suit*, prosecutes his appeal within the words of the statute. 11 Pick. 143. Whether judgment be recovered on non suit, or verdict of a jury, is immaterial. In either case, there would be no breach of the condition of the recognizance, whether construed literally or according to its spirit and obvious intent. *Ib.* 144; 8 Cow. 131.

Where such non suit is suffered, the appellee must file a complaint for affirmation of the decree and costs. 5 Mass. 373, 378.

VI. Our next enquiry is—From what decree will an appeal lie?

In the case of *Green vs. Tunstall*—5 How. 638—the High court of Errors and Appeals decided, that the “language of the *existing* act was broad enough to include every decree or order of the court,” and that “the decree, though only interlocutory, is the subject of appeal.” See also 2 Wend. 230. But where commissioners of insolvency have rejected a claim, and on exceptions to their report the claim is referred to referees, under the statute, (H. & H.

410,) such order of reference, being a mere interlocutory order, cannot be made the subject of appeal. 4 S. & M. 691.

Query?—As to the effect of the act of 1844, in which the words “any judgment, decree, or *final* order,” are used. The “language” here used not being as “broad” as that of the act upon which our High Court rendered their decision in the case of *Green vs. Tunstall*, it is probable that a mere interlocutory order would not now be the subject of appeal. (See 4 S. & M., in which it is decided that an appeal does not lie from an interlocutory order of the Probate court.) 4 S. & M. 691.

An order of the Probate court confirming the report of the auditors, on the *final* settlement of a guardian’s account, finding a balance due from a ward to the guardian, is a *final* decree, from which an appeal lies. 6 S. & R. 462.

Unless the decree of an Orphan’s court is *definite*, an appeal does not lie. 4 Dall. 160.

An appeal lies from a decree of the Probate court, giving leave to re-introduce a will for probate. 2 Hay. 165; 1 Dev. & Batt. 190.

A decree, allowing money charged by an administrator, as being expended by him, in settling a claim against his intestate, is subject to revision on appeal. 8 Conn. 87.

An appeal lies in favor of creditors and heirs from a decree of a court of Probate, accepting a report of commissioners, as respects the claims allowed to the administrator. 1 Root, 263; 2 Root, 32.* But an appeal in such a case does not lie, in favor of one creditor, because another creditor is allowed too much. 2 Root, 297.

An appeal lies from a refusal to extend time to creditors to present their claims vs. an insolvent estate. 6 Pick. 458.

But in this case no decree of distribution had been made, nor had 18 months from the grant of the commission elapsed, which is the time allowed by law in Massachusetts, to keep the commission open. *Ibid.* 460.

In Mississippi, the report of the commissioners of an insolvent

*Query—Has the High Court jurisdiction of a case sent up on doubt? 1 How. 21. A fictitious case to test a right to do a particular thing, will not be entertained by the High Court of Errors and Appeals. 4 S. & M. 689.

estate for the settlement and allowance of claims, must be excepted to at the term of the Probate court to which it is returnable, —6 How. 524; 1 S. & M. 510, 321—unless for some reasons the previous order had been void. 1 S. & M. 321.

Commissioners of insolvency may report at any time (*after* the period of their appointment has expired,) within 18 months from the date of their appointment; and their report, if received and allowed by the Probate court, will be valid. 2 S. & M. 287. And if the commissioners fail to report within the time limited, and the Probate court fail, *at that time*, to extend the time, it may extend it, at a subsequent term, if within 18 months from the grant. Ibid. 305.

No appeal lies from the court, till settlement of *final* accounts; and, on the appeal, the Supreme court may examine all exceptions to prior accounts. 3 Rawle, 243.

No appeal lies in favor of a creditor because commissioners disallowed his claim vs. an insolvent estate. 1 Root, 96. So, as to referees in Mississippi. 4 S. & M. 691.

An appeal does not lie from an order, where the granting of it is *matter of discretion* with the court. 1 John Cas. 57; 18 Wend. 319, 350; 2 Moll. 381. Therefore, a court of Probates, being clothed with a *discretion* in granting an order for the sale of the real estate of decedents, when the order is made, the question of its propriety should be closed. 2 S. & M. 326. Nor does appeal lie from the refusal of Judge to refer claim rejected by commissioners of insolvency. 4 S. & M. 691.

So an appeal does not lie from the refusal of a Judge to grant a continuance, because, allowing it, is a matter of discretion with the court. 4 How. 230.

An appeal does not lie from a decree, authorising an action in the name of the Judge of Probate on a bond, a *decree not being necessary* in such a case, but only *consent*. But if Judge withholds his consent, a decree is proper, and an appeal will lie. 8 Pick. 121; 16 Mass. 528.

Where a party suffers a nonsuit, an appeal does not lie, though the nonsuit be occasioned by a wrong decision of the court below. 2 S. & M. 519.

An appeal does not lie from a decree of the Orphan's court, respecting a matter out of its jurisdiction—as, if the decree be against a surety, on the administration bond of his principal. 1 Bailey, 548.

VII. How must an appeal be brought up?

An appeal from the court of Probates, must in all cases (except where the execution of a will is concerned,) be brought up in the same manner as from other courts. 7 Bailey's (So. Car.) rep. 203.

On an appeal from courts of Probate respecting a will, the original paper offered for probate, should be brought up by a writ of *Subpa. duces tecum*. If such paper cannot be obtained, the decree should not be either affirmed or reversed, but the appeal must be dismissed. 4 Henn. & Munf. 91.

The applicant must make his objections in the form of a plea, to which the appellee should reply. 1 Mass. 335. But upon an appeal from the decree of the Probate court approving a will, the will is to be proved as if the question originated in appellate court, and the appellee having the affirmative is to open and close. 4 Mass. 593. If the objection or plea is traversed, the issue is to the court, except where the question is of the testator's capacity, or fraud in procuring the will. 1 Aiken, 395. Every substantial averment relied on, must be filed in writing, and such as are not traversed will be considered as admitted, and treated as if demurred to. 1 Aiken, 273, 395.

VIII. On an appeal from a decree of the court of Probates, (accepting a return of the commissioners for the division of an estate,) the return is open to every objection that could legally have been made in the court below. 8 Mass. 132. (Though this is the law in Massachusetts, it does not obtain in Mississippi, where the High Court is *strictly appellate*. See 2 How. 21.)

On appeal from the court of Probate, the appellant is restricted to the grounds stated in his reasons for appeal. 4 N. Hamp. Rep. 550* Day, 137; 1 Mass. 205,

*In Massachusetts, the appellant may advance new evidence and arguments in support of his reasons.—18 Pick. 1; 1 Paige, 550. So in Pennsylvania—3 Dallas,

The appellate court can revise nothing not subject to decision below. 1 How. 162.*

If an appeal be taken from *every decree*, the court will go back only to the *first* error, and confirm *all* the preceding decrees. 5 Day, 216.

In Massachusetts, the Supreme court, on an appeal from the court of Probates, cannot exercise its general equity jurisdiction, but is confined to such decision as the court below could make. 17 Pick. 383. (But in Mississippi, as the court of Appeals has decided that the court of Probates has equity jurisdiction in relation to subjects confided to them by the Constitution, the High Court of Errors and Appeals may, it would seem, exercise its equity power, where, from the nature of the case, the court of Probates could have done so.)

The verdict of a jury will not be disturbed by the court above, where the court below has refused to set it aside, unless the evidence greatly preponderates against it. 3 Leigh, 523. And where evidence clashes, it will be presumed by the Appellate court that the court below, which saw and heard witnesses, decided correctly. 3 Leigh, 436 & 441. (But see Hopkins, Ch. rep. 408, where court ordered a jury to settle the difficulty.)

If the record states "the above will was proved and recorded," it will be presumed that the will was proved to have been executed according to its purport, and that notice to the heirs was given. 4 Bibb, 439; 2 J. J. Marsh, 511; 2 Marsh. 467; Litt. sel. cas. 503.

If record shows no proof of the execution of a will, but shows that the parties only meant to contest the capacity of the testator, the court of Appeals, concurring with the court below, as to the testator's sanity, will affirm the sentence. 3 Leigh, 523.

327. And so in So. Carolina—3 M'Cord, 475. But where new evidence is offered, the appellant must offer a satisfactory excuse for not introducing it below. 1 Paige, 550. And in Pennsylvania, on an appeal from the report of commissioners finding a balance due from the ward to the guardian, the Supreme Court will settle the account as the Orphan's Court could do, and not set aside. 2 Binney, 294.—But it affords no higher evidence. 7 S. & R. 421.

*In Kentucky, on the trial of will cases in the Supreme Court, on an appeal from the Circuit court, the trial is had upon the record, without the examination of witnesses; and the party alleging error holds the affirmative, and opens and concludes the argument. 5 B. Monroe's R. 59.

IX. What judgment will the Court of Appeals render?

On an appeal from a decree granting administration to A., the court may reverse it as to A's. appointment, and affirm it as to the residue. In such case, the court will *remand* the cause to the court of Probate, with *instructions* to grant administration to B. 3 Mass. 32; Charl. 196, 211.

On such appeal, the court may order administration to be granted to one not originally a party. 1 Dev. & Batt. 10.

Where an administrator's representation of his testator's insolvency was rejected, and a second application which he offered to sustain by legal evidence was refused, *on the ground of the former rejection*, the Supreme court, on appeal, reversed the second decree of refusal, and remanded the cause, with directions to receive any further evidence the appellant might advance, and to decree thereon according to the law and justice of the case. 6 Mass. 448.

And if the party be prevented, by the management of an accountant, from filing exceptions to an administration account, and there be an appeal to the Supreme court, that court will order the appeal to be withdrawn, and the decree to be remitted, that the applicant may pray relief in the court below. 5 Watts, 145.

In Mississippi, (by act of 1844, ch. 7, sec. 4,) when the Appellate court affirms any decree for *payment of money*, they are directed to enter judgment against the appellant and sureties, for the amount due, with interest from the date of such decree of the court below, at ten per cent. per annum, until paid.

X. The Appellate court must consider whether the facts *on the record* give jurisdiction. 3 How. 34.

If court above dismiss a case for want of jurisdiction, it cannot give any judgment for costs. 1 S. & M. 583. The party appealing would be liable in another form. *Ibid.* It is too late in the court of Appeals, to object to the commission of the judge below. 2 Nott & M'C. 27.

XI. Upon reversal of the judgment of court of Probates for mistake or error of the Judge, no costs are allowed. 1 Root, 151.

Executors and administrators are not liable for costs beyond assets. 1 S. & M. 590.

Administrators appealing for sufficient cause from a decree of the Judge of Probates, on their accounts, are not liable to pay interest—1 Pick. 550—Unless the appeal be vexatious, or without reasonable cause. 1 Pick. 530.*

If after appeal the executor or administrator receives interest on any sum contained in his account, it is an independent matter, for which a new account may be required of him. 1 Pick. 530.

If an executor offers a will for probate, but the Supreme court reverses their decision, the executor is not liable for costs. 4 Call, 423.

☞ In the note on page 27, 4th line from the bottom, after the word "order," the following omitted lines should come in:

—"of any Probate court of this State, grant an appeal to said High court of Errors and Appeals, at any time within *three* years from the date of such judgment, decree, or *final* order, *provided* said court or judge shall be of opinion, from an inspection of the record, that there is reasonable ground for such appeal. But such appeal shall not operate to stay further proceedings under such judgment, decree, or *final* order,"—

CHAPTER VII.

OF WILLS—NATURE AND EFFECT OF.

§ 1. The law attaches to the ownership of all property, the right to dispose of it, either, during the life of the owner, by deed or delivery, or by will to take effect after the owner's death. "A man's right to dispose of his estate by will, is as broad as his right to dispose of it, by deed before his death." By chancellor Buckner, in case of *Ross vs. Duncan*—1 Freeman's Chan. Rep. 587.

A will is an instrument by which a person makes a disposition of his property, to take effect after his decease, and which is, *in*

*The statute of Massachusetts gives discretionary power as to costs to the court of Probates;—but as no costs are allowed in those courts, the Supreme court do not generally allow them, unless the appeal is on frivolous pretences, or on reasons that the appellant ought to have known to be unfounded. 12 Mass. 536.

its nature, ambulatory and revocable during his life. This ambulatory quality forms the characteristic of wills; for though a deed may postpone the enjoyment of property, till the death of the disposer, yet in this case such postponement results from the *express terms*, and not from the *nature of the instrument*. Perkin's Jarman on Wills, 11.

Technically, a will embraced only land, and a testament only personalty; but in the course of time, both, by use, have become synonymous, and include both real and personal property. Burns. Eccl. law. Tit. wills.

§ 2. The power of bequeathing personal estate is coeval with the first rudiments of law, but the power to devise freehold lands of inheritance was originally conferred by the statute of 32 Henry 8th, and the explanatory act of 34 and 35 Henry 8th; 2 Inst. 33; Perk. Jarm. on wills, 27. Previous to this act, lands could only be devised through the instrumentality of uses. 2 Inst. 33.

In consequence of the statutes of Charles 2d, in England (and also in Mississippi and other States of the Union where similar statutes prevail,) three incidents must concur to constitute a valid will, except in certain cases:

1st. It must be written.

2d. It must be signed by the testator himself, or by some other person in his presence, and by his direction.

3d. It must be attested by credible witnesses in the presence of the testator, *unless* it be written wholly by the testator himself.

A devise of land must be reduced to writing during the testator's life;—if declared by words only and reduced to writing after his death, it would be only a nuncupative will, which cannot pass real estate. 6 Serg. & R. 452; 3 Lomax, 24. And such will could not pass even personal estate, unless accompanied by all the solemnities required by our statute.* (How. & Hutch. ch. 36, sec. 6, p. 387.)

*Inasmuch as any one, not prohibited by law, may make a valid and effectual will—3 Lomax, 8—and as every will, solemnized according to law, and made by a person *not* laboring under any disability, is valid and effectual, it will be only necessary to ascertain, who are incapable of making a valid will? This will be done, after we have ascertained, what is a valid will?

§ 3. All wills could be made *orally* in England, till the statute of 29 Charles 2d.—which to prevent fraud and perjury, required them (except in certain specified cases) to be in writing, signed by the testator and attested by witnesses.

In Mississippi, (and the United States generally,) a statute analogous to the English statute, has been enacted. Our statute, transcribed from the statute of Virginia,* and passed in 1821, provides, that “every person aged 21 years, if a male—or aged 18 years, if a female, or upwards, being of sound and disposing mind, and *not* a married woman—shall have power, at his or her will and pleasure, by last will and testament or codicil in writing, to devise the estate, right, title and interest in possession, reversion or remainder, which he or she hath, or at the time of his death shall have in or to lands, tenements, or hereditaments, or rents charged upon, or issuing out of them—or goods and chattels, or personal estate of every description whatsoever, so as such last will and testament be *signed* by the testator, or by some other person *in his presence and by his direction*;—and moreover, if not wholly written by himself, or herself, be attested by *three* or *more credible* witnesses in case of the devise of *real* estate—and one or more credible witnesses in case of the devise of goods and chattels and personal estate, *in presence of the testator*—saving, however, to the widows of testators their *dower* in any estate real or personal, so devised. How. & H. ch. 36, sec. 2, p. 385.

§ 4. Under this statute, a will written wholly by the testator himself, is valid, without witnesses, and will be sufficient to convey both real and personal estate.

In such case the hand-writing of the testator may be proved by any person having a knowledge of it. 4 Dana, 221; 1 M'Cord, 430. And this knowledge may, it seems, have been gained by reading his papers after his death. 2 Leigh, 249; 6 Rand. 316; 2 Marsh. 74.

§ 5. A will need not have a seal—1 Mass. 460; 4 *ibid.* 462; 1 Dana, 102; 1 M'Lane, 70; 1 Dall. 94; 1 Ley. & R. 256; 2 Black. 355—unless a seal is required by the statute. *Ibid.*

*Our statute being a transcript of the Virginia statute, the decisions in that State will be copiously introduced in such parts of this work as relate to wills.

It was once held that sealing, was equivalent to signing a will.—3 Lev. 1; 2 Str. 764.—But this opinion has been repeatedly overruled, as opening too wide a door to fraud. 1 Wilson, 313; 1 Ves. Ju. 13; 17 Ves. 459.

And though it once was also a subject of doubt, whether the *mark* of a testator or witness, *who can write*, would satisfy the statute, (Roberts,) yet, of late, a mark under such circumstances has been held sufficient. 6 Rand. 33. See also 3 Nev. & Per. 228; 8 Adol. & Ell. 94, cited in Perk. Jarm. 69; 5 John. 144. But in New-Jersey, such mark is not the *actual signing* required by the statute. 7 Halst. 70.

§ 6. If the testator's name be written *by himself* on any part of the will,* it will be a sufficient signing within the statute—3 Lev. 1; 1 Repts. Const. Ct. (So. Car.) 345—though on several pieces of paper. See 5 Moore, 484, and S. C. 2 Brod. & Bing. 650.—But it must appear in such cases that all the sheets of paper were produced at the time the witnesses attested it; and in the absence of contrary proof this fact will be presumed, from circumstances. 3 Burrows, 1773; 1 Black. rep. 407; 3 Humph. 378; 6 Rand. 33.

But in Kentucky such signature will be sufficient, only, when the testator *intended* that as his signature, and *did not intend* to sign at the foot. Dana, 2, 3. This qualification of the rule is sustained by the decisions in Doug. 241; 4 Ves. 197, n.; 9 ib. 249; 1 Mer. 503; 2 Virga. cases, 553.† Such also, it is presumed, would be the doctrine in Mississippi, under our statute.

*See Freem. 538; 1 Eq. cas. ab. 403, pl. 9, S. C. Pre. ch. 184; 3 Lev. 86; 2 Ves. Sen. 454; 9 Ves. 249.

†In Virginia, it is decided, that where the testamentary paper is not *subscribed* by the testator, and on the face of it there appears to have been an intention on the part of the writer to make some other devise, or do some other act, which is not done, it will be considered as wanting that character of *finality and conclusiveness of intention*, essential to a will, and ought not to be admitted to probate as such. As, if the will directs the debts of the testator to be paid out of funds, afterwards appropriated, and the will contains no such appropriation;—or if the will state a list of debts shall accompany the paper, and none such accompany it; or if it express an intention to appoint an executor, and none be named; or if certain bequests be interlined and others underscored, *without being erased*, thereby showing a suspended intention in regard to those bequests, either of striking them out or not, as circumstances may require,—the omission of a date, want of an usual conclusion and an abrupt breaking off of the will, are all circumstances tending to show that it is not completed, or that the testator, (having had full time to conclude it, and not having been arrested by sickness or death,) has abandoned his original intention, and that therefore it is no will. 2 Virga. Cas. 553.

In New-York, the statute requires the testator's signature to be placed at the end of the will. 4 Wendel, 168. So, in Arkansas. Rev. St. ch. 157, sec. 4.

If signed by another, and acknowledged by the testator as his signature, it will be sufficient. 4 Dana, 1. (But by the statute of Mississippi, it must have been done *in the testator's presence*.) When testator signs *at the foot*, it may be by his own hand, or another's. 4 Dana, 2, 3; 2 Virga. cases, 553.

Where the signature of the testator was effected by another person's guiding his hand, with his consent, and he afterwards acknowledged it, it was held to be, in point of law, the act of the testator. 4 Wash. C. C. R. 262. *In re*, Field, 3 Curt. (Prer.) 752.

§ 7. In Tennessee, it has been decided that if a writing be imperfect, and such imperfection result not from an abandonment or change of the testator's intention, but from the act of God, which defeated its completion, it may be established as a valid will. 2 Humphreys, 202.

But the presumption of law is against such a paper as a will, and it must also appear that *so far* it is the *entire* will of the deceased, and is *so far* not repugnant to his wishes, but carries them into effect. *Ibid.* See also 3 Dev. N. C. rep. 19—in which it is decided that this presumption may be rebutted by proof.

In Alabama, the same doctrine is virtually adopted. See 2 S. & P. 454.*

The cases from Tennessee and No. Carolina, are reconcilable with the decision from Virginia only on the ground—1st. that the imperfection must arise from the act of God, and not from the change of testator's intention; and 2d. that in both cases the legal presumption arising out of such imperfection is against the will, but may nevertheless be rebutted by proof.

In No. Carolina, it has been decided that, "where the will con-

*In this case, the testator applied to an attorney, to prepare a will under certain instructions, by which he designed particularly to provide for a dependant sister; and the will being prepared, was exhibited to him; and in the presence of the attorney and witness he made several important alterations, and seemed satisfied with the draft thus altered, and gave the same to the attorney to be copied; and the same, after being copied, was returned to him to be executed, and he said "he would examine and consider of it;" and after his death, the same copy unaltered, was found in his possession—it was held to be inadmissible to probate. 2 S. & P. 454.

tains a clause of attestation, the want of attestation is not conclusive evidence of abandonment of the testator's intention to make a will. 4 Devereaux, 301.

§ 8. On this subject the English authorities, though apparently variant, have been reconciled thus.

If the intention to devise be certain, and the requisitions of the statute be *verbally* complied with, the law will imply an intention in the testator to conform to the statute, and by coupling the *fact and intention*, will give effect to the instrument, as in the case of *Lemayne vs. Stanley*. 3 Lev. 1; 3 Lomax.

But although the statute be verbally complied with, yet if the express intention of the testator be to carry the requisitions of the statute into formal execution, but an accident intervenes to prevent him, courts cannot by construction supply the defective execution, as in the case of *Right vs. Price*—Doug. 241; Rob. 124; *Powell on dev.* 77, 78; 5 Moore, 484; 2 Brod. & Bing. 650.

§ 9. No particular form is essential to a valid will—2 Nott & McCord, 531; 1 ib. 517, 409, 430; 6 Dana, 257, 357—Provided, the formalities of law are complied with. Ib. and 1 Desaus. 554. And provided it leave no part of the testator's intention unexpressed. 6 Watts, 353.

It matters not whether the amount bequeathed be in words or figures, or whether the will be written in full or in notes usual or unusual, so it be free from ambiguity. 2 Lomax, 24. It may be *printed*, if signed by the testator. 2 M. & S. 286; 2 Ch. Bl. 376.*

And a will may consist of several instruments of different nature and form, all constituting one will. 1 Will. ex'rs. (2d Am.ed.) 59. A will of husband's property signed by both the husband and wife, is a valid will of the husband alone. 2 Fairf. 303.

A will may be in the form of a deed, provided it is intended not to operate till after the testator's or donor's death. 1 Phill. 1, and cases cited; 10 Yerger, 321. Or, of a bond. 2 Hagg. 235. Or, marriage settlement. 1 Phill. 218; 2 Hagg. 554. Or, of letters.

*The words "give" or "devise" are not necessary—"release" is sufficient.—Bendl. 30. So, of an estate in mortgage or equity of redemption. 2 P. Wm. 236. A devise of "the income of lands" is a devise of the land itself. 9 Mass. 372; 1 Ashm. 136.

2 Phill. 575; 1 Hagg. 130; 1 John. Ch. 153; 6 Gill. & John. 25. Or, an endorsement on a bond or note. 4 N. Hamp. repts. 434; 6 Dana, 30; 4 Serg. & R. 545. Or, of drafts on bankers. 3 Phill. 317. See also 4 Dessaus. 617.

But it is essentially requisite that the instrument should be made *to depend on the death of the testator*, as necessary to consummate it. For where a paper directs a benefit to be conferred *inter vivos*, (by himself on another, *both living*,) with express or implied reference to the death of the party conferring it, it cannot be regarded as testamentary. 1 Wms. ex'rs. (2d am. ed.) 59; 10 Yerger, 321; 4 N. Hamp. R. 34; 4 S. & R. 545.

§ 10. The *animus testandi* need not appear *on the face* of the instrument. 1 M'Cord, 430; 2 Leigh, 249—See also 3 Lomax. ch. 4, sec. 1.

This intention may appear on the face of the instrument, or from extrinsic evidence. 1 M'Cord, 409; 2 Nott & M'Cord, 531.

Nor is it necessary that the testator should have known that he was performing a testamentary act. 2 William's ex'rs. (2 Am. ed.) 59. Nor that he should have intended to perform a testamentary act. *Ib.* For it is a settled rule, that if the paper contains a disposition of the property to be made *after death*, though it *were meant* to operate as a settlement or deed of gift, or a bond, though not intended to be a will or other testamentary instrument, but as an instrument of a different shape,—yet if it cannot operate in the latter, it nevertheless will in the former character. 2 Wms. ex'rs. (2d Am. ed.) 59. If the instrument show, by its contents, a *posthumous* destination of the maker's property, it will operate as a will, and any contrary title or designation he may give it, will be disregarded. Perk. Jarm. 12; 4 Desaus. 617; 1 Ch. cas. 248; S. C. 1 Mod. 117; 1 Ves. Snr. 127. If the instrument create any benefit to be enjoyed during the life of the maker, it is not a will.—1 Ves. 127; 4 Leon. 166—and other cases cited in Perk. Jarm. 13. See also 2 Ves. Jnr. 204, and 3 My. & K. 32, reviewing former cases, cited *ibid.* Nor is an instrument, though containing some technical expressions indicating a testamentary character, a will, if it depends on acts to be done, or which may be done by the person named in it, in the life-time of the maker. 2 Desaus. 92.

§ 11. But an instrument is not necessarily a will, because it cannot operate in the form given to it. 2 Wm's.ex'rs. (2d Am.ed.) 59.

The true principle is, if there is proof, either in the paper itself, or from evidence *dehors*—

1st. That it was the *intention* of the writer of the paper to convey the benefits by the instrument which would be conveyed by it if considered as a will.*

2d. That the *death* of the maker was to give effect to the instrument.

Then, whatever its form, it will operate as a will. *Ib.* See 2 Nott & M'Cord, 531.

And this distinction exists in the consideration of papers which are in their terms dispositive, and those which are of an equivocal character, viz: The first will be entitled to probate, unless they are proved *not* to have been written *animo testandi*—whilst in the latter, *animus* must be proved by those claiming under them.—*Ibid.* cited in note to Perk. Jarm. 12.†

And even where an instrument is not intended as a will by the writer, nor executed by him as a will, yet he may adopt it as such afterwards. 2 Nott & M'Cord, 531; 9 Connt. 102; 1 Mass. 158.

§ 12. An instrument having some features of a will and some of a deed, executed by a native of Scotland about to remove to this

*To ascertain this intention, recourse may be had to several modes:—

1st. Where it is expressed in the writing itself.

2d. Where the paper is in the form of a letter, or memorandum or deed, or in any other form containing an *actual disposition* of his estate *to commence after his death*—this though not formally a will, is such in effect and operation.

3d. When the intention is dubious, and cannot be understood from the face of the paper, but only by the introduction of *parol* evidence. 1 M'Cord, 409, 517; 2 Murphy's No. Car. R. 133; 2 Nott & M'Cord, 531.

† The following letter was held to be no will—"I am desirous to see you, and would be glad you would come down immediately, as it is my wish that you should *heir* every thing I have *at my death*. But I fear, unless you come quickly, I shall be defrauded out of every thing by a person, I once took to be a friend. I know you can save the property for me, and all I desire is the use of it my lifetime, and it is probable that will not be long. I would write more fully on the subject, but can explain more to you when I see you." It was proved that the deceased did not believe this letter to be his will. 1 M'Cord, 517. See also 6 Dana, 257; 4 Dana, 3; 3 Yeates, 324. Where A. executed an instrument under seal declaring, that in consideration of B's. care of him during illness, he acknowledged himself indebted to her, and that his executors should pay her a certain sum in one year, which instrument was delivered to B,—It was *held* that this was not a will, but an obligation. 3 Yeates, 389. See also 5 Binney, 490.

country to take possession of an estate here, and *made to prevent disputes in case of his death*, is contingent, and cannot operate to defeat the claims of his wife, whom he married subsequently in this country. 1 Desaus. 543; 5 Conn. 317; 7 Conn. 315.

An instrument limited by a condition as to its operation, cannot be admitted to probate as a will, after failure of the contingency, on the happening of which it was to take effect. 2 Watts & Serg. 145.

§ 13. The legal presumption is that the testator read the will and knew the contents thereof. 1 No. Car. rep. 87.

Unless he was blind, could not read, or some fraud or concealment was used. 3 Wash. C. C. Rep. 484; 3 Marsh. 145; 3 Leigh, 436, 32.

And in N. Carolina it has been *held*, that in the case of a blind and illiterate man who makes a will, the law presumes him to have been acquainted with its contents, and does not require that it should have been read to him in the presence of the attesting witnesses, provided it be otherwise duly executed. 2 Dev. 291. See also 2 B. & P. N. R. 415; 3 Wash. C. C. 580; 3 Leigh, 32.*

But if the testator wrote the will himself, and a codicil be afterwards prepared by another, it must be proved that the testator read it himself, or that the whole of it was read to him before he signed it. 6 Call, 90.

§ 14. If a will be not wholly written by the testator himself, it will be valid only when the testator has signed it in the manner set forth in the preceding sections, *and* caused it to be attested by three *credible* witnesses in case of the devise of *real* estate—and of one credible witness in case of the devise of *personal* estate, in the presence of the testator and by his direction.

It is also to be noted, that a will *charging land* with legacies bequeathed by the testator, must be solemnized in like manner as a will conveying the land itself. 4 Mass. 421; 4 Pick. 417.—

*In Pennsylvania, it is decided that, where a will is not signed by the testator, (the law of Penn'a, not requiring a will to be *signed* by the testator—6 S. & R. 452) and is not in his own handwriting, it must be proved by two witnesses, that he knew its contents. 6 S. & R. 489. And where special instructions for drawing a will are proved by two witnesses, and a will is drawn conformably thereto in the testator's lifetime, though he is prevented by extreme illness from executing the same, it is a good will according to the statute of 1705. 1 Yeates, 87.

So, of a will devising a term of years out of the inheritance. 2 Atk. 272; 2 Ves. 179; 1 Bro. C. C. 60; 1 P. Wms. 422.

But a charge on real estate, by a will duly executed, *in aid of legacies*, will extend to legacies bequeathed by a codicil not so executed. 1 Abr. Eq. C. 409; 1 Ves. & Be. 446; 18 Ves. 156; 6 Ves. 560; 2 Atk. 268; 1 P. Wms. 423; Ambler, 556; Ram. assets, 110; 3 Lomax, 46. The reason is, that charging real estate for such purpose, is equivalent to directing it to be converted into personalty, and applied as part of testator's personal estate and in aid thereof. 8 Ves. 49; 3 Lomax, 46.

But when the charge is originally on the real estate, and *exempts the personalty* from its liability to be first applied to payment of debts or legacies, a legacy given by an unattested will or codicil will not be a charge on the real estate of the testator, charged by his duly attested will. 3 Lomax, 46. So, where a charge on land in payment of future legacies is not general, but limited to particular legacies, none others will be charged on the land. *Ib.* 47—citing various cases—and *Ib.* 48.

§ 15. But a will “of the rest of the testator's property,” with a schedule of the personal effects, is good as to the personalty, tho' not so executed as to convey real estate. 3 Pick. 374; 21 *ib.* 98. But in Mississippi, such will must have one witness, to have that effect.

Whether it was the intention of the testator that a paper purporting to dispose of real and personal estate, should operate as a disposition of one, unless it can take effect as to both, is a question of fact for the jury. 4 Dev. 302. But a court of Probate on the offer of a will for probate, acts as a jury, and may draw any conclusion a jury could. 3 Leigh, 442.

§ 16. A will need not be *signed* by the testator *in the presence* of witnesses. 2 Ves. Sn. 455; 3 Curt. (Prer.) 551, 607; 4 Kent. (5th ed.) 515, 516; 3 Marsh. 146.

An acknowledgment or recognition by the testator, of his signature, express or implied, in presence of the attesting witnesses, is equivalent to actual signing. 17 Pick. 373; 4 Kent. (5th ed.) 515, 516; 1 Metcalf, 349; 3 Bibb, 494; 4 Dana, 3; Perk. Jarm. 71.

No particular form of acknowledgment is necessary, provided it amounts *in substance* to the declaration that the instrument is the last will and testament of the testator. 26 Wendell, 325.

The subscribing witnesses must know it at the time of its execution, to be a will, and must also know that the testator understands it to be, and meant to execute it as a will. 26 Wend. 325. If so stated in the attestation clause, the presumption will be that the testator did declare it to be his will, unless the witnesses recollect affirmatively and testify that the attestation clause was not read and understood at the time of the execution of the testament. *Ibid.* *Attesting* means more than barely subscribing names to the paper. It implies a knowledge of publication, and of the facts necessary to a legal publication. 1 B. Munroe, 117; 2 Maine, 438; 1 Mass. 258. In England, "if the testator knows the instrument to be his will—produces it to three persons and asks them to sign the same—intending that they shall sign it as witnesses—and they subscribe their names in his presence, and return the same identical instrument to him—it is an acknowledgment in *fact*, though not in *words*, to the three witnesses that the will is his." 3 M. & Pay, 689; S. C. 6 Bing. 310; 5, M. & P. 316; S. C. 7 Bing. 457; 1 Cramp. & Mees. 440.

These decisions place beyond doubt, the rule previously established, that a testator's acknowledgment, implied or express, in the presence of the attesting witnesses, that an instrument is his will, is equivalent to the signing required by the statute. See *Perk. Jarm. on wills*, 73—"Courts must look to what is done, and not to what is said only."—3 Lomax, 32, citing 1 Cr. & M. 140; 2 Tyr. 73, and other cases; see also 17 Pick. 373, 380.

In New-Jersey, actual signing is required. 2 Harrison, 86—and in New-York, the statute requires actual signing—or a positive declaration of the testator. 8 Paige, 488.

§ 17. A *mark* has been decided to be a sufficient attestation—8 Ves. 185—but it should be avoided. *Perk. Jarm.* 73; see also 5 John. 144, in which the witness marked his initials. In the case of *Chaffee vs. Baptist*, M. C. N. Y. Jan'y. 1843, attestation by *mark* was held good, although the statute required each witness to *subscribe* his name. It is also a good attestation in So. Carolina. 1 Hills, Ch. R. 266—And in Louisiana—9 Louis. 512; 11 ib. 251; 4 Kent, (5th Am. ed.) 514, note (*d.*) See also 8 Adol. & Ell. N. S. 94; 3 ib. 117. (In Pennsylvania a will need not be signed by witnesses—1 Dallas, 102, by statute.)

§ 18. It has been decided that witnesses must not sign before the signature of the testator is affixed. 3 Curt. (Prer.) 648. But in Kentucky, it is settled, that the order of time in which the testator and witnesses subscribe, is not material. 1 B. Munroe, 117.

§ 19. It is not necessary that the witnesses should subscribe in the presence of each other. 1 Metcalf, 349; 4 Kent. (5 Am.ed.) 516; 3 Leigh, 436; 2 Ch. cas. 109; Prec. Ch. 184; 2 Atk. 176; 3 Lomax, 40—And they may sign at different times. 2 Haywood, 411; 1 Rand. 131; 3 Lomax, 40.

But if a will be signed by two witnesses, and a codicil by a third, such attestation is not sufficient. 3 Lomax, 40; 4 Desaus. Ch. 312; see also 6 Yerger, 423. But *both* must sign *in the presence* of the testator. 1 Iredell, 561. And each should attest every part. 2 Haywood, 523. It may be signed before one and acknowledged before another. 1 Murphy, 176.

§ 20. No particular form of words is essential to constitute an attestation. Perk. Jarm. 74.

The memorandum subscribed by witnesses need not mention their having subscribed it *in the presence* of the testator, though this fact must be proved orally, if the will is contested. *Ibid.*—citing Comyn, 531; 2 Str. 1109; 8 Vin. ab. 128; pl. 14; Willes, 1; 6 Dow. 202. And where the death of the witnesses prevents actual proof, a compliance with the statutory requisitions in all its parts, will be presumed, even though not expressed in the memorandum subscribed by them. 2 Str. 1109.

§. 21. To constitute “presence,” the testator should be mentally capable of recognizing the act performed—for otherwise, his mere corporal presence will not suffice. Doug. 241,—cited in Perk. Jarm. 75. And the testator must, moreover, be actually conscious of the transaction in which the witnesses are engaged. *Ibid.*—citing 4 Kent, (5 ed.) 516; 1 P. Wms. 740.

If testator be where he *might see* the witnesses subscribe, it is sufficient. *Ib.*—See also 1 Metcalf, 349; 3 Harris & M'H. 462; 7 Har. & John. 61; 5 Har. & John. 480; 5 Monroe, 202—citing various authorities—as if it be in the same room. *Ib.* and 2 Salk. 688—or in another room, if where the testator could see them. *Ib.*—and 1 Bro. Ch. cas. 99; Carthew, 81;—see also 3 Russel, 443; 2 Carr & Payne, 488; 1 Leigh, 6. So, though not in the same

house, if testator could see them. 1 Bro. Ch. cas. 99; S. C. Dick, 586.

But, it is to be observed that an attestation in the same room, is *prima facie*, in the testator's presence—if in another room, it is *prima facie not* in his presence. 1 Leigh, 6.

§ 22. But mere contiguity of the places occupied by the testator and the witnesses will not suffice, if the testator's view of the proceeding of the witnesses be necessarily obstructed. Perk. Jar. 76—or if from his actual position he could not see them—*Ibid.*—although in the same room. 1 Leigh, 6, 22; 1 Mau. & Selw. 294; 2 Salk. 688; 1 P. Wms. 740; 2 Carr. & Pay. 488; 3 Har. & M'H. 457; Doug. 241.*

It is immaterial whether the absence of the witnesses was occasioned by necessity, or volition, or the solicitation of the testator. 1 P. Wm. 239, cited in Perk. Jarm. 78.

Where it is not proved in what part of the room the attestation was made, it will be presumed that the most convenient spot was used, and the ordinary position of a table probable to have been used, will be considered. 3 Russ. 444.

§ 23. The witnesses must see the whole will. If it be on several sheets, and all are in the room when the last is executed and attested, it would be a good will;—but if *either* of the sheets was not in the room, it would be otherwise. But the jury must presume that all the sheets were in the room, unless the contrary be proved. 3 Burr. 1773; 1 Black. rep. 407. And the witnesses need not sign each and every sheet of paper, but only the last. 3 Burr. 1773.†

§ 24. The testator must publish his will by doing some act which indicates his intention that the writing shall be regarded as his will, and shall operate as such. 3 Lomax—citing 3 Atk. 161; 7 Taunt. 361.

*In case of a blind man, it is sufficient if the witnesses subscribe in the same room with him, or in another room, where if not blind, he might see them—if done at his request—and if it appear satisfactorily to the Court, that he knew its contents, and intended the testamentary disposition contained in it. 3 Leigh, 32.

†The effect of a codicil duly executed, upon a will not duly executed, to which the codicil refers, will be hereafter considered under the head of "*Codicil.*"

The words "signed and published as my will," are a sufficient publication. 1 Com. R. 196. So the delivery of a deed as a will. *Ibid.* So if the words "sealed and delivered" are put above the place where witnesses are to sign. 4 Burn's Eccl. law, 116; 1 Cr. & Mee. 171.

§ 25. A publication may also be inferred from circumstances, and have the same force as if expressed. Pow. on dev. 90, 95; 4 Burn's Eccl. law, 114; Com. R. 197, cited in 3 Lomax dig. 42. As, for example, the signing and acknowledging before witnesses, and calling for their attestation. 2 Marsh. 73.

§ 26. A compliance with all the requisitions of the statute, is considered a publication. 1 Tuck. Com. pt. 2, p. 294; see also Rob. wills, 308, 309, 392; 1 Rand. 192; 2 Leigh, 256.

The custody of a will of personal estate is sufficient publication—1 Wms. on Ex'rs. (2d Am. ed.) p. 50, c. 2, s. 1—whether the custody be that of the testator or of a confidential friend. Perk. Jarm. on wills, 91. But it is otherwise, if it be in the custody of one interested in its contents, especially if the depositary transmits the document anonymously to some party interested in maintaining its validity. *Ibid.*

CHAPTER VIII.

WILLS—NUNCUPATIVE.

§ 1. A nuncupative will or testament, is where the testator without any writing doth declare his will before a sufficient number of witnesses, and is called nuncupative, i. e. *naming*, because when a man makes a nuncupative will, he must name his executor, and declare his whole mind before witnesses. And a nuncupative testament is of as great force and efficacy, (except for lands, tenements, and hereditaments,) as a written testament. This kind of testament is commonly made when the testator is very sick and past all hope of recovery. Swinb. on wills, 38, ch. 12; Shep. T. 399.

§ 2. The unqualified allowance of nuncupative wills was found productive of the greatest fraud, and it became necessary to subject them to very strict regulations. Accordingly the statute of Charles 2d was passed, requiring certain formalities to be observed, without the observance of which this species of will should not be allowed to take effect. 3 P. Wms. 355.*

§ 3. In Mississippi a similar statute has been enacted, by which it is declared that, "no nuncupative will shall be established unless it be made in the time of the last sickness of the deceased at his or her habitation, or where he or she has resided for ten days next preceding his or her death, *except* where such person is taken sick from home, and dies before his or her return to such habitation;—nor, where the value bequeathed exceeds one hundred dollars, *unless* it be proved by *two* witnesses that the testator or testatrix called on some person present to take notice that such is his or her will, or *words* of the like import. (H. & H. ch. 36, sec. 6, p. 387.) And after *six* months have elapsed from the time of speaking the intended testamentary words, no testimony shall be received to prove a nuncupative will, *unless* such words or the substance thereof, shall have been reduced to writing within *six* days after speaking the same. (Same act, sec. 7.) And no probate of any nuncupative will shall be taken, or letters testamentary granted thereon, till after the expiration of fourteen days from the decease of the testator or testatrix, nor until the widow, if any, and next of kin if resident in the State, have been summoned to contest the same, if they think proper. †

§ 4. Since the passage of the foregoing act, no nuncupative will can be established unless the following prerequisites concur:

*In Massachusetts, only soldiers in active military service, or mariners at sea, can bequeath their personalty by a nuncupative will. 1 Perk. Jarm. on wills, 90, note 1. So, in New-York. *Ibid.*

In Ohio, a nuncupative will may pass real estate. 10 Ohio, 462.

In Mass., N. York, Vermont, Del., Va., S. Car., R. Isl., Mich., Ark., Wisc., Misso., the same formalities are required in wills of personal as of real estate.—1 Perk. Jarm. on wills, 90, note 2.

In Tennessee, *two* witnesses are required to a will of chattels, but they need not sign the will. 6 Yerg. 425.

In Penn. the same number of witnesses is required to wills of real and personal estate. 1 Dall. 278; 4 Kent (5 Am. ed.) 516, 518.

† See act of 1846—and 6 S. & M.

I. It must be proved to have been made in the last sickness of the deceased.

By these words, "last sickness," is meant the "last extremity"—20 John. 502—or where the testator was overtaken by sickness, and was not able to make a will in writing. *Ib.* and 5 Littel, 113; 4 Rawle, 46.

In Tennessee, it has been held, that where the testamentary words were uttered on Monday, and the testator died on the following Friday, the will was established. 4 Humph. 342.

In Kentucky, (in a recent case,) it was decided, that upon requisite proof, a paper not perfected as a written will, may be established as a nuncupative will, where its completion was prevented by act of God, or by any other cause than an intention to abandon or postpone its consummation. 3 B. Munroe, 163.

II. A nuncupative will must also have been made at the habitation of the deceased, or where he or she resided for ten days next preceding his death, *except* where such person is taken sick from home and dies before his return to his habitation.

III. Where the value bequeathed exceeds \$100, the will must be made in the presence of *two* witnesses, and it must be proved by *two* witnesses that the testator called on some one present to take notice that such is his or her will, or words of the like import.

A nuncupative will may be made not only on the proper motion of the testator, but on the interrogation of another. Swinb. 39. But the interrogation must not be made by a suspicious person, or be importunate to have the testator speak. *Ibid.* 112. In such case, it is to be presumed, that the testator did say "yea" rather to deliver himself from the importunity of the demandant, than upon intent to make his will. *Ibid.*

But if the person making such motion be not any way suspected, and it appear withal, by some conjectures, that the sick person had a desire to make his will, as if he send for his friend, who being come unto him asketh him, "whether he make this or that man his executor?" to which the sick man answereth "yea!" in this case the testament is good. *Ibid.* 113.

No precise form of words is required, nor is it material whether the testator speak properly or improperly, so that his meaning be apparent. But it is not sufficient for a testator to leave a sound on the ears of his witnesses, unless he leave some understanding also of his will and meaning. Ibid. 354.

The American decisions agree, in the main, with the principles above set forth.

In Kentucky, it was decided in the case of *Hare vs. Bryant*, that "under the statute of 1797, requiring among other things, to render a nuncupative will valid, that the testator should have called on some one present, to take notice or bear testimony that such is his will, or words of the like import"—if it was proved sufficiently, what the meaning and intention of the testator was, it would be absurd that her ignorance of this formality should defeat her intention.

In North-Carolina, it is decided, that persons introduced to prove a nuncupative will, must have been called on specially by the testator to bear witness what he was saying, and if the words were drawn from the testator by a person interested in establishing the will, the words will *not* constitute a valid nuncupative will. 2 Murphy, 350.

In Virginia, it is decided, that it is essential to a nuncupative will, that the deceased, at the time of speaking the alleged words, had a present intention to make his will, and spoke the words with such intention; and distinctly indicated that intention by calling on persons present to take notice or bear testimony that such is his will, or by saying something tantamount in substance, and indicating plainly that the words spoken were designed to be testamentary. 3 Leigh, 140.

In Tennessee, it is decided, that the leading object of the statute of 1784, as to the special requirements to bear witness, or the *rogatio testium*, is, doubtless, to distinguish between a valid nuncupative will, and casual conversation by one in his illness on the subject of his property, and to guard against the latter being imposed on the court as testamentary. But, it is not necessary for such purpose for the testator to quote the very words of the statute. If he intends to perform a testamentary act, it is

sufficient for him, by intelligent act and language, to invoke their special attention and attestation to what he intends to say or has said; as if he say to them, "I wish to dispose of my effects," and then goes on to make the *factum* of such disposition, the court cannot say, the statute has not thereby been complied with. 4 Humph. 342—(Dodson's will.)

But in South-Carolina it has been decided, that when the deceased on his death-bed said, "he gave all his personal property to his sister Jane," and being asked if he wished any of his relations to have any of his property, replied,—“no, it is my sister Jane's, and she may do as she pleases with it”—these words were held insufficient for a nuncupative will. 1 M'Cord, 518.

IV. If in reducing such testamentary words to writing, a part be omitted, the residue may be good. 2 Hen. & Munf. 91.

Both witnesses must be present at the same same, and hear the same declaration, to make a nuncupative will good under the statute—10 Yerger's repts. 501—otherwise, they cannot prove the *factum*. *Ib.*

V. The witnesses required by the statute to prove a nuncupative will, must be those competent according to the common law: and if incompetent from interest, a release will render him competent. 3 No. Car. R. 40.

The rule is, that whoever is not disabled by law, shall be admitted. Swinb. 344.

In Maryland, a nuncupative will for \$3,236 was admitted to probate on the testimony of the wife of one of the legatees, who had released his interest, she being one of the witnesses. 3 Harr. & John. 208.

CHAPTER IX.

CODICIL.

§ 1. The next species of will, is a Codicil—i. e. a supplement to a will, forming part of it, and explaining, altering, adding to, or subtracting from the disposition of such will. Swinb. 14; 2 Bl. 500.

For the effect of a codicil in republishing a will, see *post*, Tit. republication.

§ 2. Every person capable of making a will, may also make a codicil—and whoever cannot make a will, cannot make a codicil. Swinb. 14.

§ 3. At common law, a codicil might be either written or unwritten. Swinb. 14. But since the passage of the statute of frauds, it would seem impossible for a codicil, not in writing, to be established, for the purpose of affecting a previous will,—not as a codicil to a nuncupative will, because that can only be made *in extremis*, and is itself the *last* declaration of the testator—and not as a codicil to a written will, because by the statute, (How. & H. ch. 36, s. 3, p. 386,) it is provided, that no devise so made, nor any clause thereof shall be revocable, but by the testator or testatrix destroying, cancelling, or obliterating the same, or causing it to be done, in his or her presence, or by a subsequent will, *codicil* or declaration *in writing*.

§ 4. A codicil must, therefore, possess all the solemnities requisite to constitute the will which it is intended to operate on. 5 Pick. 112; 9 ib. 350; 15 ib. 388; 14 Mass. 208; 1 P. Wms. 344; Doug. 244; 1 Ves. Jr. 11; Gilbert's dev. 115.

But a person may, by codicil, in the form of a nuncupative will, dispose of personal estate, not embraced in his will of a prior date. Com. dig. Dev.; Raym. 334. See 7 How. 636.

§ 5. It was once supposed that a distinction existed between a codicil and devise in this respect; that, in case of their being a devise in the same will, or in two different wills of the same date, of the same property, to two different persons, both would be void. But, if the same thing happened in a codicil, or in two codicils

of the same date, the different devisees should divide the thing between them. Swinb. 15; 1 Vern. 30; Plow. 539. But in the case of 2 Atkyns, 374, the Lord Chancellor said, that "the result of what Swinburne says is this—that if the same thing be given to two persons, they shall take as *joint-tenants*, *unless* there is something to indicate and prove the intention of the testator to revoke and vary the devise." And that "in case of a simple legacy, as if a man gives a horse to A in the first part, and in the latter gives the same horse to B—the latter is a revocation of the former legacy, and therefore Swinburne is mistaken in point of law." In the same case he adds—"No certain rule is laid down as to the construction of devises, but they must depend on their particular circumstances." Applying these rules to this case, he decided, that "where a testator gives his real and personal estate to A and B, equally between them, and on the death of one of them, to James Ulrick in fee—with a few pecuniary legacies, and charges his real estate with the payment, if the personal estate should not be sufficient, and by his will declared that he gave *all the rest and residue of his personal estate* to his uncle Leonard Collins' three daughters—the latter was a revocation of the former, and the daughters of Leonard Collins were entitled to the personal estate." 2 Atkyns, 372, 376; Roper on Rev. 27—See also 3 Monroe, 76; 3 J. Marshall, 251—1 Hill's Ch. rep. 367.—In the latter case it is decided that where there are two inconsistent bequests of the same property, the last will revoke the first.

§ 6. A codicil may be annexed to a will, actually or constructively. It may not only be written on the same paper, or affixed to or folded up with the will, but may be written on a different paper, and put in a different place; and it may be annexed to a devise of real or personal estate. Peters d. vol. 15, 402, (note *.)

A codicil will refer to the last will in date, if no date is mentioned. 4 Ves. 615.

§ 7. In a question as to validity of codicil, the party contesting probate, is not confined to enquiry respecting the testator's sanity and signature, but he may prove fraud in obtaining the signature. 6 Call's R. 90. And if the codicil was written by a person other

than the testator, it must appear that it was read to or by the testator before signing. *Ibid.* 90.

CHAPTER X.

REVOCATION OF WILLS.

§ 1. No will can be revoked (in Mississippi) except by the testator or testatrix, destroying, cancelling, or obliterating the same, or causing it to be done in his or her presence, *or* by a subsequent will, codicil, or declaration in *writing, made as aforesaid.* (H. & H. ch. 36, sec. 3, p. 386.)

The statutes of most if not all of the United States, provide for revocation of wills, by burning, cancelling, &c., in language similar to that of the English statute. 4 Kent, (5th ed.) 520, 521, *note.*

§ 2. A will can only be revoked by the act of the testator, or by its destruction or cancellation, by his direction or sanction—5 B. Monroe, 60—and in his presence. (See act, H. & H. *ante.*) 1 Jarm. on wills, 128.

And such revocation of a good subsisting will, can only be effected by proof of another will existing at the time of the testator's death revoking the former, or by proof that he cancelled the latter will, revoking all former ones with a mind to die intestate. 2 Dall. 289; 14 Mass. 208; *ib.* 421; Roper on wills, 28; 2 Nott & M'Cord, 482. If the revocation be a postscript to a second will, it will remain in force, though the second will be destroyed, if the postscript remain uncanceled. 3 Hen. & Munf. 502.

§ 3. As the mere existence of a will without knowledge of its contents, is not allowed to disinherit the heir or interrupt the regular course of descent—(see Gilb. on Dev. 115, and Cowp. 92)—So, it is equally necessary that the contents of a subsequent will should be known, before it can operate as a revocation. The mere

circumstance of making a will is an equivocal act, and may not be done *animo revocandi*—i. e. with the intention of revoking a former one. Roper on Rev., citing various authorities. Unless contents of the latter will are known, it is no revocation—8 Cow. 56.; Hard. 374; 3 Mad. 203—even where there is a difference between the two, if that difference be unknown. Rob. on wills, 265.

§ 4. The second will must expressly revoke the former, or be clearly incompatible with the former—*quoad* the subject matter of such devise—for no subsequent devise will revoke a former one, unless it apply to the same subject matter. Cowp. 87; 7 Bro. P. C. 44; 2 Dall. 268; Rob. on wills, 261; see also 8 Cowen, 56. Nor unless it be moreover clothed with all the solemnities necessary to the validity of, and belonging to the will which it is intended to revoke.* 14 Mass. 408, 421; Pick. 535, 543; Com. R. 451; Littel, S. C. 541.

§ 5. The intention to revoke must not be imperfect or prospective, and the same rule of intention applies to a subsequent will which by implication would revoke a former one. 2 Marsh. 74; 2 East. 488.

Therefore, a declaration by a testator, that he has revoked a particular devise in his will, though reduced to writing, and attested by three witnesses, will not operate as a revocation, unless signed by the testator. 3 Lomax, 67, citing 3 Lev. 86. (See sec. 7, *post*.)

§ 6. And no subsequent will will revoke a former one, though incompatible with it, unless made *animo revocandi*—2 Nott & M'Cord, 482, and 2 Connt. Repts. 67—*nor*, unless it be, moreover, clothed with all the solemnities necessary to constitute the validity of and belonging to the will it is intended to revoke.† 14

* A will duly executed and containing devises of real estate, but endorsed by the testator, with a declaration in these words—"This will is invalid, March 9th, 1813—as L. S. has agreed that my wife shall claim no right of dower, and bound himself accordingly"—was held to be expressly revoked by such endorsement—2 Connt. 67—otherwise, if indorsement were of a *future* intention to revoke, 2 Marsh. 74.

† A testator's stating in his will, that, "being about to make a journey, and knowing the uncertainty of life, he deemed it therefore advisable to make his will," does not make it conditional, so as to be revoked by his return. 9 Peters, 174.

Mass. 408; ib. 421; 1 Pick. 535, 543; Littel's selected cas. 541; Comyn's R. 451. So, of a will charging land. 3 Lomax, 63.

In construing the English statute of frauds, a distinction has been taken between wills intended to operate a revocation only, and when they moreover attempt to dispose of the devised estate: that, in the first case, a will signed by the testator, in the presence of three witnesses, without their attestation is sufficient, but in the second their subscription is necessary.—Roper on Rev. 32. This distinction was founded on a difference between the 5th and 6th sections of that statute, the former requiring the written attestation of three witnesses, the latter not requiring such attestation in writing. *Ibid.*

In Mississippi this distinction cannot exist, inasmuch as our statute of frauds requires the "attestation" of witnesses *to a will*, and requires a revocatory will or codicil to be "made as aforesaid."

The English statute of frauds did not embrace wills of personal estate. Therefore, if A by a second will, in his own hand-writing, or by a writing signed or approved by him, bequeathed his *personal* estate in a manner inconsistent with the first, the last disposition would defeat the former.—Roper on Rev. 31, citing 1 Eq. cas. 409. But the statute, in Mississippi, makes no distinction, in this respect, except that a second will, revoking a devise of real estate requires three witnesses, but revoking a bequest of personal estate, requires only one witness. 5 Pick. 112; 9 ib. 350; 15 ib. 358.

§ 7. Where the testator, having executed a will, causes another to be prepared, and supposing the latter to be duly executed, cancels the first, and the second proves invalid, the cancelling will not revoke the first. 7 Har. & John. 388. But if intending to revoke a former will, he sends for it for that purpose, and the devisee prevents him, although the will is not thereby revoked, yet in such case, the devisee will be considered, in equity, a trustee for the heirs. 2 Marsh. 74; 1 P. Wms. 352—(See sec. 5, *ante.*)

§ 8. If a party deliberately revoke the first will, the revocation will be good, though he intend to make another will and fail to do so. 7 Har. & John. 388. But it would be otherwise if the

second will were void for matter *dehors*—1 Pick. 45—as if, the subsequent will be perfect in form, but inoperative on account of the incapacity of the devisee to take under it, it may yet operate a revocation of a former will inconsistent with it. *Ibid.* 535, 543; 1 Roll. abr. 614; 10 Mod. 233; Rob. on wills, 280.

§ 9. If there be ever so many parts or duplicates of the same will, cancellation of one will cancel all. Roper on Rev. 32; 7 Vern. 762; 1 P. Wms. 346; Cowp. 49; 7 Har. & John. 388; 2 Hag. Eccl. rep. 266; 3 ib. 191.

The execution of a *third* will, is a revocation of two former ones, although the last be lost or mislaid, in which event the contents may be proved by parol. 1 Bay's rep. 464. But the statute applies to finished instruments, and does not exclude proof, that a paper writing offered for probate never was, in fact, the will of decedent. 4 Dev. 228.

§ 10. The statute has not been construed so strictly as to exclude all evidence touching the *quo animo* the act was done, which is a conclusion to be drawn by the court and jury from all the circumstances. 2 Yeates, 170; S. C. 2 Dall. 266; 3 Curt. (Pre. 1844) 636.

The mere act of cancelling, unless done *animo revocandi*, is nothing. Littel's S. C. 504; 4 Kent, (5th ed.) 531, 532.

The cancellation or cutting off a portion of the devises in a will, leaving the testator's signature at the conclusion, or in the body when no other signing had been intended, with the declaration that the intention was to annul only what was so cancelled, the residue is not affected, but remains a valid will—1 B. Monroe, 57; 7 John. 374—otherwise if testator intended to revoke the will. *Ib.* 3 B. & A. 489. The word "obsolete," written by the testator on the margin of his will, but not signed by him or any person for him in the mode prescribed by the act, does not operate as a revocation of the will. 2 Watts & Serg. 415.

An instrument need not be totally destroyed or torn to pieces. 2 Nott & M'Cord, 272; 13 Ves. 290; 2 Bl. R. 1043.

§ 11. If the testator cancel, deface, or destroy a will *unadvisedly*, or it be done by some other person, without his consent, or by some casualty, or when he doth willingly pull away the seals, and then doth afterwards seal it again; or where the whole testa-

ment is not cancelled or defaced, but only some part or the chief part thereof, (as the naming of the executor or the like,) for it is still good as to residue—or where there be several papers or writings, one, ten or each of them containing the whole will—unless it can be proved that the testator intended to avoid it;—or where the testament was lost in the life-time of the testator or afterwards, the will is not thereby avoided; for in this case, so much as can be proved is still in force. Shep. Touch. 411; 1 Wms. on Ex'rs. 73, 74.

§ 12. Cancellation is, therefore, only *prima facie* evidence of revocation; but if made with the intention to execute a new will, the cancellation is conditional, and unless a new will be afterwards executed, is of no effect. 2 N. Car. R. 311. (But see 2 Nott & M'Cord, 272; 4 Monroe, 367.)

Where the revocation is a relative dependent act, done with reference to another will which the testator thinks he has legally executed, it may be a revocation or not according to the testator's intention. 7 Har. & John. 388; 2 Dess. 528.*

§ 13. So, where the revocation of a prior will is founded on a mistake, the revocation will be void. 3 Ves. 321; 2 Per. & D. 278.

Or where it proceeds on a false impression, originating in deceit practised on the testator—4 Vesey, 802—Otherwise if the testator proceed on a mere doubt. 3 Ves. 327; 3 Atk. 552; 1 Ves. 32.

Where a testator by his will devised all his land in trust to trustees, to sell, and out of the proceeds to pay annuity legacies, &c., and afterwards obliterated, interlines, and alters all the bequests without republication of the will, it was *held* that the devise to sell was not thereby revoked. Cowper, 812—(See next section, and sec. 16, *post*.)

§ 14. But the cancellation need not be actual, if intended as such. 2 Bl. R. 1043.

The most trifling act, if coupled with the *intention* to revoke,

*Where a blind man orders his will to be destroyed, and believes it done accordingly, but it is not, and no act towards its destruction is proved, it is no revocation. 3 Leigh, 32.

A court of Probate does not declare it such, but whether a court of Equity would, Query? 3 Leigh, 32.

is sufficient. 2 Nott & M'Cord, 272; 4 Monroe, 461. If not coupled with such intention, throwing ink instead of sand on it, so as to deface it, will not operate a revocation. Cowp. 52; 2 Dall. 266; 7 John. 394; 4 Stu. R. 297; 7 Har. & John. 388.

The degree of burning, cancelling, or obliterating, required by the statute, must depend on the circumstances of each particular case. 4 Monroe, 361. If the testator without a republication of his will, make alterations and corrections with the intent, not to destroy, but to enlarge and extend a devise already made, it is not a revocation. 7 John. 394; 2 Bro. & Bing. 652; 5 Moore, 484, S. C. So, striking out the name of one of three devisees, or trustees.—3 Bos. & Pull. 16; 4 East. 419; 1 Smith, 96.

If a jury find that a will has been interlined and crossed in places, and the seal torn off, *animo revocandi*, it will be a sufficient act of revocation. 4 Monroe, 361. And it need not be done in the presence of the testator, if done by his order. 2 Nott & M'Cord, 272. Though a seal be not necessary to a will, yet if it be torn off by the testator, *animo revocandi*, it will be a revocation of the will—4 Mass. 460—otherwise, if not done with such intent. 1 Ab. eq. 409; 1 P. Wms. 344, n. 1.

§ 15. The act of cancelling, destroying, and obliterating, used in the statute, are such as would, *at common law*, have destroyed a will; and the act in each case must be accompanied by an *intent* of the testator to revoke the will, and it must be proved as other matters of fact. 4 S. & R. 299. And a knowledge by the testator, that a third person by his direction, has done it, is sufficient to show such intent—if he afterwards refrain from any attempt to supply the loss. 2 Nott & M'Cord. 272—(See sec. 15, *post*.)

§ 16. When a will is found among the papers of the deceased immediately after his death, in a mutilated condition, the law will presume it to have been done by the testator in his life-time, *animo revocandi*. 3 Iredell, 303. So, where the will was equally accessible to a *stranger* and the deceased, in the life-time of the testator. *Ibid*,

But, if not found mutilated till two days after the testator's death, and in the mean time it has been in the custody of the heir, a different presumption arises—*Ib*.—Or if the heir first refused to produce it, not mentioning the mutilation. *Ibid*.

If a testator makes his will five days before his death, and after his death it cannot be found, it will be presumed that he cancelled it, in the absence of proof to the contrary. 10 Yerg. 84. So, if a will be duly executed and in the possession of the testator five years afterwards, and within a few months prior to his decease could not be found, it will be presumed that he cancelled it. 6 Wend. 173.

But where a man retains a will with full opportunity to revoke it, and does not revoke it, the presumption is strong that he wishes it to stand; though, at first, it may have been unfairly obtained from him. It is otherwise, where soon after its execution, he dies—or, where after its execution, his intellects are too weak to judge of the propriety of the revocation of it. The jury must judge, in such case, whether the testator's state of mind was such as to enable him to judge of the propriety of cancelling a will, obtained by fraud, or under influence. 8 S. & R. 573.

The failure of one, who is informed of the loss or destruction of his will, to publish another, affords a presumption of an intention to revoke the last. But this presumption may be rebutted by evidence; as, the declaration of the testator himself. 5 B. Monroe, 72. But if part of the contents of the last will be proved, that part may be established. *Ibid.*

§ 17. A will can be cancelled only by the testator himself, or by some person in his presence, acting by his express directions.* So that if a stranger tears a will to pieces, it will not thereby be revoked. 2 Vern. 441. And no directions given by the testator to a third person to destroy his will, will amount to a revocation, if the will be not destroyed. 3 Leigh, 32—(See sec. 14, *ante.*)

No intent, unaccompanied by any act, will destroy a will—2 Marsh. 190—And the act must be *completed*, for if arrested before its execution, it will not be a revocation. 3 Barn. & Ald. 489.†

*In Mississippi, it must be done in the testator's presence, to be in conformity with the act.

† Where A, having executed a will in due form, in presence of witnesses, buys and sells land—and several years afterwards shows to a third person, a paper, marked "memorandum of my last will," by which he makes a different disposition of his estate, and appoints executors—and requests such person to put it in form, but is advised to show it to counsel—and consents—but survives five months, being sane and capable, and dies without altering this paper, with former will in

§ 18. Changing an executor in presence of one witness, is no revocation of a will of real estate—for the power of an executor extends only to the personalty. 4 Monroe, 154. And if A give a legacy to such charity hospital as his executor shall select, and afterwards strike out the name of his executor, this is no revocation of the legacy, for the court will appoint. T. 1778; Bro. Ch. C. 12. (See sec. 14, *ante*.) Antedating a will is no revocation of it, and it will be considered as executed in conformity to the statute, though one witness only can prove the alteration of the original, and the other witness was not present at the alteration. Littel's S. C. 501.

§ 19. A codicil, being considered a part, and continuation of a will, is never presumed to revoke it. It will not, therefore, have that effect, unless the testator has considered it a *distinct* instrument, by *expressly* revoking the will, or by making a disposition inconsistent with it; so that if a person die leaving a will and several codicils, they will constitute but one instrument, and receive a like construction. 1 Ves. 178, 186; 2 Atk. 86—cited in Roper on Rev. 30.

Hence, if a person, by a codicil, annul part of his will, and afterwards add another codicil, referring to the will, for a particular purpose, and then confirm the will in other respects, such second codicil will not revive the part annulled by the first—because, the first codicil is part of the will, and must be considered such, and not a distinct and inconsistent instrument. 4 Ves. Jr. 610.

But a codicil which operates a republication of the will to which it relates, is, of course, revocatory of any intermediate will. 1 Add. 30; 2 Bin. 406; 8 Cowen, 256; 3 Bligh. N.S. 26—cited in Perk. Jarm. on wills, 159; 7 Durnf. & East. 138; 4 Ves. 610; 1 Ves. 488; 12 Moore, 2.

§ 20. A codicil then is only a revocation of a will, in the precise degree, in which it is inconsistent with it—8 Cowen 56—or where it expressly revokes the provisions of a former will. 1 Perk. Jarm. on wills, 156.* If, however, the testator shows by the most

possession *uncancelled*—it was *held*, by law of Penn'a., the paper, proved by two witnesses to be in the testator's hand-writing, revokes the former will so far as inconsistent therewith. 1 S. & R. 256.

*As to the effect of a will and several codicils, see 8 Bing. 475; 1 You. & J.

loose and untechnical language in a codicil, that any devisee or legatee, shall be excluded from all benefit under his will, such intention, of course, must prevail—and particular expressions, admitting of a more restricted construction, will not be so construed, if, upon the *whole* instrument, it can be collected, that the testator meant to use them in the *less* restricted sense. *Ib.* 165.

§ 21. If the act, regulating probate of wills, require *two* witnesses, yet, where it is attempted to prove, that a man, having two wills in his hand, and intending to destroy the last, by mistake, destroyed the first, it is not necessary that the same proof should be made of an intention to destroy the existing will, as would be necessary to prove the validity of an original will. 4 S. & R. 297—(But see sec. 6, *ante*.)

§ 22. Besides the mode of revocation provided by statute, there are circumstances, which, by legal construction, imply a revocation of a will; as, certain alterations in the situation of the testator, or of the estate devised. 4 Kent's Com. 521, 527; Rob. on wills, 396; 3 Lomax, 74.

Neither the negative terms of the English statute, declaring that no devise in writing of any lands, &c., shall be revocable, otherwise than in the particular modes there pointed out, nor the superadded affirmative declaration that all devises and bequests of land shall remain in force until revoked in some of these modes, have been considered, in England, as preventing revocation of wills, by implication, under certain circumstances. 3 Lomax, 74; 2 Atk. 272. *Sublato fundo, tollitur id, quod fundi potest*—and the rule is the same, as to revocation of a sum of money, charged on land. *Ib.* Shep. T. 410, n. [2]—And, of a power to trustees to sell. 1 Russ. & Myl. 677; Amb. 224; 1 Bro. ch. c. 221.

§ 23. If a man conveys away the estate devised, though he take it back by the same conveyance or otherwise, it is a revocation of a precedent will, both at law and in equity—although he did not intend to revoke it. 7 John. Ch. R. 258; 2 Atk. 202; 2 Bl. Comm.; Shep. T. 410.

So, a conveyance, inoperative by reason of not being completed, or of the incapacity of the grantee, *may* amount to a revoca-

tion, if it shows the intention of the testator to revoke his will. 7 John. Ch. rep. 258; E. 1714; 10 Mod. 233; 1 Bro. Pr. Ch. 450; 5 Pick. 112; 9 ib. 530; 15 ib. 388.

In the case of *Beard vs. Beard*, lord Hardwicke decided, that, where a man made a will devising all his property away from his wife to his brother, and afterwards, by *deed poll*, granted to his wife all he then had or might have thereafter—although the deed poll was void as a grant, yet it was sufficient to operate a revocation of the will, as to his personal estate. 3 Atk. 72.

§ 24. This rule is not confined to cases of an actual alteration of dispositions to third persons, but has been extended to cases of an alteration in the legal estate, though it leaves in effect, the testator, as to his beneficial interest in the thing, in the same plight in which he was before it took place. Pow. on dev. 567. And the sale of land, devised in a will, is a revocation of the devise, even where the grantee is the devisee, and though the deed be cancelled in the life-time of the testator; because, the will having been revoked by the deed, will not, without republication, operate as to the land. 9 Dana, 25.

Any alteration in the testator's estate, which *changes the nature* and effect of his *seizin*, after the making of his will, is a revocation. 5 Pick. 112. And parol evidence is admissible to show the situation of the testator's property. 15 ib. 388. (See sec. 27, *post*.)

But if the devise or deed be obtained by fraud, it will not operate a revocation. T. 1790; 3 Bro. Ch. C. 156.

§ 25. But a *mere* agreement to sell, will not, if unexecuted, operate a revocation of a devise of land. Cox, (N.J.) R. 212; 2 Murphy, 317. But if a sale be *rescinded* after execution, it is nevertheless a revocation. 5 Pick. 112. And if a contract to sell become once *obligatory* on the testator, it is a revocation, though rescinded in his life-time. Dick. 653; 6 Sim. 40; 7 Ves. 558; 9 ib. 170.

§ 26. A feoffment, though, to the same uses as those contained in the will, is a revocation of it. T. 1743; 2 Atk. 598; 4 Burrows, 1960; 3 Atk. 803. As, where a woman, by settlement before marriage, conveyed her estate to trustees, to such uses as she, covert or sole, by deed or will, should appoint, and devised her

estate during coverture; and then, after her husband's death took a conveyance of the estate, from the trustees, to her own use, it was held to be a revocation of the will. 3 Bro. Ch. C. 319;—(Dougl. 722, seems *contra*—but in this case there was no change of the estate, but only of the trustees.) See sec. 22, *ante*. If a person, having devised an estate *per autre vie*, afterwards purchase the inheritance, it is a revocation. 2 Atk. 430.

§ 27. A foreclosure of a mortgage devised, after the date of the devise is a revocation of the devise—4 Burr. 1960; 3 Atk. 803—because it is a virtual alteration of the estate. *Ibid.* and 1 Saund. 277, note 4; 1 Williams, 101. And the rule is the same, whether it be done for a partial or general purpose, to which a court of law never adverts, (and equity, in case of revocation, never controls the law—except, where the beneficial interest, being distinct from the legal estate, is devised,) and the devisor afterwards takes the legal estate, without any new modification or alteration, or where, having the complete legal and equitable estate at the date of the will, he divests himself of the legal, but retains the equitable interest—as in case of a mortgage to secure the payment of debts. 1 Bos. & P. 576; T. R. 399; 5 Ves. 404.

In the last cases, though a revocation at law, it is not in equity—1 Vern. 329. (But see 6 Ves. 221; 7 T. R. 399*) except *pro tanto*. 3 John. Ch. C. 148—and the equity of redemption shall go to the devisee—although the devisee himself be also the mortgagee. 1 Vern. 329; 3 Atk. 805; 2 P. Wms. 33; Prec. in Ch. 514, corrected in 5 Ves. 656; Rob. wills, 271–2; 3 Ves. 685. But if, after creating the mortgage, the testator had declared a trust, to such uses as he might appoint, and in default thereof, to himself in fee, it would have been a revocation. 2 Ves. Jnr. 600; 3 Lomax, 89. So, a surrender of a lease devised and taking a new lease, is a revocation. 3 P. Wms. 163; 2 Atk. 597; 3 Lomax, 90.

§ 28. A devise is revoked by an exchange, though the land after the death of the devisor be restored to his heir, under an

*The general rule as stated by lord Hardwicke is, that “though the conveyance is of the fee simple of the land to the mortgagee, yet in the consideration of a court of Equity, the interest conveyed is merely a personal interest, having no quality of real estate; and that therefore the testator is deemed as having created only a chattel interest, which would be a revocation only *pro tanto*. The equity of redemption did not pass by the conveyance. 3 Ves. 685; 3 Lomax, 89.

arrangement, in consequence of a defect in the title of the other party to the exchange. 8 Ves. 256.

An agreement for partition by two co-heiresses, is a revocation, against the devisee of one moiety. 5 Ves. 648; 2 P. Wms. 328; *ibid.* 622. If it be nothing but a partition, it is not a revocation; but the *slightest addition* to that purpose, renders it a revocation; and taking it to be a mere partition, if the *manner* of it destroys the interest of the testator in the thing given, so that at his death, there is *no interest* in him to answer the *description*, the devise cannot operate. 7 Ves. 564; 8 *ib.* 281. See also, Toml. 164; 4 Madd. 368, 2 Ves. & Bea. 382; 7 John. Ch. 265, 266; 1 Beat. 358; 8 Sim. 171; 2 Bro. C. C. 108, cited in 1 Perk. Jarm. wills, 135, note [3.]

§ 29. It has been observed that a conveyance by a testator, of land previously devised by him, and a reconveyance to himself in fee, is a revocation of the devise. The reason of this rule is, that the law presumes that the testator would not have made a new conveyance without intending to revoke his will. But this rule must be understood with this limitation—that, if the conveyance be for a particular purpose only, then it shall revoke no further than to effect that purpose—as if the testator create an estate for years, or for life, in the lands devised, this shall operate a revocation only *pro tanto*. (See sec. 23, and note;) 3 Atk. 748. Therefore, where A devised lands to B, charged with an annuity to C, and afterwards leased them to D, it was held to be no revocation of the annuity, the rent being sufficient to defray it. So, of a devise of a term of years, to take effect in the life-time of the devisor, to the devisee of the fee is no revocation. 2 Atk. 72. So, a mortgage, of land devised, as security for money—3 Atk. 748;* the rule being the same in regard to legal and equitable interests. *Ibid.* But if a man charges a portion in his will, and in his life-time gives it to the donee, it is a revocation. 2 Atk. 273. So, if he charges a debt on his land by will, and pays it in his life-time. *Ibid.*

*The devisee of a mortgaged estate being entitled to have the incumbrance discharged out of the personal estate, it is a perversion of language to call a mortgage a revocation *pro tanto*. 1 Perk. Jarm. wills, 135.

§ 30. A conveyance may therefore operate a revocation only *pro tanto*. As, if *part* only of the real estate devised, be sold, it is only a revocation of the devise, as to that part. 9 Pick. 350; 11 Ohio R. 287.

So if A devise land in trust, the rents to go to his daughter, till death or marriage, and if she marry with his consent, then to her and her heirs—and she afterwards marry with his consent, and he settled a *part* of the land on her and her husband and died, this was a revocation, only, *pro tanto*. M. 1716; 2 Vern. 720.

Where a testator devised his real estate to his children, in undivided shares, and afterwards on the marriage of one of them, conveys to that child an aliquot share equal to that devised—this is a revocation only of *all* the shares *pro tanto*, letting in the advanced child to participate equally with the others, in the remaining shares. 2 P. Wms. 334—cited in Perk. Jarm. wills, 146.

§ 31. The doctrine of implied revocation, arising out of the alteration of the estate devised, depends on these reasons—

1st. The favor which the law shows to the heir.

2d. On the principle that the deviser must be seized at his death of the lands devised, in like manner as at the date of his will.

3d. Because any alteration of the estate devised is held to be an alteration of the intention of the deviser. 3 Lomax, 80—citing Jarm. Pow. on dev.

§ 32. Another circumstance on which implied revocation is founded, is a subsequent marriage followed by the birth of a child. 4 John. Ch. C. 506, citing various authorities. But marriage with the legatee is no revocation of the legacy. 4 Ves. & Be. 465; 2 East. 530; 1 ab. Eq. 413; 2 Atk. 424.

Where a person made a will in the life-time of his first wife—who died without issue, and he married a second wife by whom he had issue—it was held, that the second marriage and birth of a child was a revocation of the will. 4 Burrows, 2182; Doug. 35; Ambl. 721.

And marriage and the birth of a posthumous child have the like effect. 5 T. R. 49.

§ 33. Whether, if a testator has more children by his first marriage born after the date of his will—and becoming a widower

marries again, and has *no* child by his second wife, the will is revoked—is an undecided question in England. 4 Vesey, 840.—It has however been decided, in Maryland, that the birth of a child after date of the will does not operate a revocation of the will. 4 Har. & John. 142.* And in such case, as a second marriage, without issue, would not revoke the will, it seems that this decision settles here, the question (raised in England,) against revocation. See 4 John. C. C. 506; 2 East. 530; 4 M. & S. 10; 1 Phill. R. 447; 2 Ed. R. 263; 5 T. R. 51, in note; 4 Kent, 523.

§ 34. Marriage and the birth of a child only constitute a *presumptive* revocation, which presumption may be rebutted by parol evidence. 4 Kent, 532; 4 John. Ch. R. 506; Doug. 30; 1 Wash. 140; 3 Call. 289. A subsequent codicil will also rebut such presumption. 2 Add. 455.

§ 35. If the devise does not properly pass the *whole* estate, marriage and birth of issue will not operate a revocation of it.—Doug. 31–40. Therefore, where a man made a disposition by will in favor of his children by a former marriage, and afterwards married, and had other children by a second marriage—but there was a marriage settlement by which the latter were provided for—it was held, that, for *this* reason, the will was not revoked. 7 Ves. 348; 1 Phill. R. 447; 3 Call. 337; 4 Kent's Com. 523. And where the revocation would not benefit the issue of the subsequent marriage—as, if the devise be of real estate in England, which by the law of primogeniture would descend to the eldest son by a first marriage. 1 Ves. & Be. 390. And in the case of *Yerby vs. Yerby*, Judge Roane decided that there would be no revocation, unless the devise was to others than the testator's children. 3 Call, 289. See 2 East. R. 530—(and 2 Ch. cas. 16, overruled in 3 Call, 289.)†

§ 36. It will be evident from the preceding sections that the doctrine therein laid down rests on the presumption which arises

*See what is said on this subject, *post*—sec. 39.

†In Penn'a. under the act of 1789, marriage, or birth of issue, operates a revocation of a precedent will, *so far* only as regards the widow or posthumous child or children, although the subsequent issue is the testator's only child, as to provisions not interfering with those interests—as appointment of executors—power to sell for payment of debt, &c.—the will still remains valid. 3 Bin. 498.

from the change of the testator's situation, and the total destitution which would await the issue of his subsequent marriage, coupled with the testator's duty to provide for them—that it was the *intention* of the testator to revoke a previous will, made before these circumstances existed. 2 East. 530; 1 Ves. & Be. 465; 1 Wash. 177.

§ 37. Marriage alone is a revocation of a woman's will, without birth of issue—5 T.R. 58–59:—Because, 1st. It was her own act:—2d. If it were not, the husband might by undue influence oblige her either to revoke or continue it as best suited his interest. Swinb. 270; Roper on Rev. 19.

And here may be observed a distinction between the effect of a disability voluntarily assumed, and one imposed by act of God. For if a person, after making a will, became *insane*, his will is not thereby revoked. Swinb. 68; Roper on Rev. 20; Wms. on ex'rs. 78.

A better reason than either of those assigned above, why the marriage of a woman is a revocation of her will, is this:—that if she dies before her husband, the will can have no effect, the making of it being only inceptive, and it taking effect only by the death of the testatrix. And though it has been the received opinion, that if she survived her husband, the will would remain as valid as if she had not married—See 3 Lomax, and authorities there cited—Yet their opinion is counterbalanced by the weight of authority. *Ibid.* (See also the authorities above quoted.)

§ 38. In analogy to the reasoning in cases where marriage and the birth of a child, are allowed to revoke wills, it seems that if a person intend to defeat a prior disposition in consequence of a *mistake*, such as a belief in the devisee's death, when he is in fact living, and the like—the prior instrument will not be revoked by the latter—the sole motive for the testator's intended alteration of his will being a supposed event, which has not happened. 3 Ves. 321, cited in Roper on Rev. 29; 2 Yeates, 179.

But the rule is otherwise, where the mistake is only as to the *legal effect* of the testator's acts. 3 Atk. 551. (See sec. 13, *ante*.)

§ 39. By statute, (in Mississippi,) it is provided that where a testator made his will, when he had no child living, and no provision made for such child as he might have, and no mention

made thereof—if at the time of his death he leave a child born, or his wife *enceinte* of a child which shall be born—*such will shall have no effect*, during the life of such after-born child, unless the child die without having been married, and before he or she has attained the age of 21 years; and the estate both real and personal shall descend to such child, subject nevertheless to the bequests made in said will if such child die before marriage or arriving at the age of 21 years. (How. & H. ch. 36, p. 386.)

It is also provided that if a testator, having children born at the time of making his will, shall at his death leave a child or children born *after* the making of such will, such child or children, (if unprovided for by settlement,) and if neither provided for nor disinherited by the will, but only pretermitted—shall have the same portion of the father's estate that he or they would have been entitled to, had such father died intestate. (H. & H. ch. 36, p. 386.)

The foregoing statutes have created two more instances in which circumstances operate an implied partial revocation of a testator's will, founded on the presumption that the father did not intend to leave *after-born* children unprovided for.

Under a similar act in Kentucky, it has been decided, that where T. devised his estate to his wife and *three* children, if his wife should not be *enceinte* at his death, but if she should, then to her and her four children—and he lived till his wife had her *fourth* child, and then died leaving her *enceinte* with the *fifth*, it was *held*, that, that the devise was not confined to the *four*, but that *all* the five children took an equal share. 6 Mon. 175.

§ 40. In case of revocation by a conveyance of the estate, devised by the testator, after the execution of a will, parol evidence is not admissible to prove that the testator did not intend to revoke his will. 2 M'Cord, Ch. R. 278; 2 Ves. 606. If it were the intention of the testator that the will should continue to operate on the land, the law says it shall not, and that law is imperative. *Ibid.*

The rule, in this case, is different from that which allows the presumption arising from marriage and birth of issue, to be rebutted by testimony, for the reason that a conveyance of land is a solemn act of the testator himself, importing that he meant to re-

voke his will. But it is otherwise where the presumption arises only from a change in the testator's situation. *Ibid.* (As to the change of this doctrine introduced by statute in Virginia, see 3 Lomax, 92, citing 1 Wash. 100.)

Chancellor Kent has adopted the English doctrine as part of the settled jurisprudence of this country. 4 Kent's Com. 530-1.

§ 41. The Probate Court may decide on the question of revocation by implication, and if it has been revoked, may refuse to admit the will to probate. It may also, where admissible, resort to parol evidence for the purpose of repelling or supporting the presumption of revocation. 1 Wash. 140; 3 Hen. & Munf. 527; 2 Munf. 209.

CHAPTER XI.

RE-PUBLICATION OF WILLS.

§ 1. Wills, being ambulatory till the testator's death, may, at any time prior to that event, be revoked or revived, at his pleasure.

The republication of a will, will give to it all the effect of a will *made at the time* of republication, and set up and re-establish it, so as to make it pass all the property which the words embrace, belonging to the testator *at the time of such republication*. 1 Perk. Jarm. wills, 174; Cowp. 130; 2 Binn. 414; Cro. Eliz. 493; Com. 381; 1 Ves. 437; 2 M. & S. 5; 1 Mer. R. 285; 3 Pick. 213; 14 Pick. 534.

And will also enable a person, not in existence at the time of the original execution of the will, to take under it, provided the words of the will sufficiently describe him. 1 P. Wms. 275; 5 Ram. wills, 266; Perk. Jarm. wills, 182; 2 Ves. 626; 4 Durnf. & East. 601.

§ 2. But a republished will, will not pass lands acquired between the original date and its republication, unless they answer the description contained in the will. Therefore, if the will convey lands described only as B, C, and D, it will not pass *other* lands, *afterwards* acquired—and so of the *devisee*; and therefore, if an estate be devised to A, and his *heirs*, and A die in the testator's life-time, B, who is the heir of A, cannot, by a republication, take the devise; because, the effect of the limitation in the will, was such, that B could only take by *descent* from A—whereas, if he took under the republished will, he would take as *purchaser*. Plow. 345; Prec. ch. 439; Cro. El. 422. (See also 2 M. & S. 5.)

A republished will merely speaks from the date of its republication, and such republication cannot bring within the scope of the will, any subject not comprehended by it, had the circumstances under which it was republished existed at its date. Perk. Jarm. wills, 183, citing 13 East. 526; 10 Barn. & Cress. 895.

§ 3. At common law, the courts leaned much in favor of every republication of a will, and when the *intent* to republish could, by any means, be ascertained, it was allowed that effect, even though such intention rested on pure verbal declarations. Rop. on revoc. 34. And this, even where such declaration avowed only an intention to adopt, and look on a will once revoked as the only proper will of the testator. *Ibid.*

To correct the evils growing out of this rule of the common law, the courts, after the statute of frauds adopted a new rule, requiring the same solemnities to *republish*, as the statute required to *make* a valid and effectual will of lands. Rop. on Rev. 34; 9 John. 312; 7 ib. 394.* Otherwise the statute of frauds might be evaded. 1 Ves. 440; 2 Rand. 192; 2 Connt. R. 67.

§ 4. It was once held that to pass after acquired lands, the will must be re-executed. 3 Rep. in Ch. 90. But, it is now sufficient, to republish a will, that there be a codicil duly attested and referring to the will; and in such case, the will will take effect from

*In Mississippi the same rule prevails—For, as our statute of frauds, unlike the English, requires certain solemnities to the revocation of a testament of chattels. So, the same solemnities are necessary to the republication of *all* wills, as to the revocation of them. See 9 John. 312; 7 ib. 394.

the time of the execution of the codicil. 10 Modern, 96; Ram. wills, ch. 17; 2 Ves. 98; 2 P. Wms. 329, 334—And this, even though only an equitable title be obtained, if afterwards it be clothed with the legal title—and the latter may be paid for out of the personal estate—E. 1805; 10 Ves. 605, 611—Unless a contrary intention appear. 7 Ves. 98; 7 T. R. 484; 2 Bos. & Pull. 500; 2 Russ. & Myl. 117.

And it is sufficient if the codicil clearly refer to the *subject matter* of the will, though not annexed to it. Perk. Jarm. on wills, 174, note (1)—Com. R. 381; 3 Bro. Pre. ch. 85. So a codicil referring inaccurately to a will, may republish it. 1 Addams, 38; 3 Phillim. 361.

§ 5. No precise form of words is necessary, but any words denoting the continuance of the testator's mind, except so far as alterations are made. 1 Roll. ab. 617, cited in 3 Lomax dig. 96. The person himself might be at a distance from the will itself, and might know the substance, though he could not recollect the words. *Ibid.*—citing 1 Ves. 437; 4 ib. 615.

Whenever a codicil ratifies and confirms a will, it operates a republication of it. Amb. 93; 1 Ves. 492; Cowp. 158; Amb. 371; 3 B. Monroe, 393; 3 Bing. 614; 2 M. & Sel. 5*—overruling Rob. will, 490.

§ 6. The circumstance of the testator having expressly devised by such codicil *part* of the estate purchased since the date of his will, does not exclude the *rest* of such after-acquired estate, from the effect of republication, but the same will pass under a residuary devise, from the date of the codicil. Perk. Jarm. 175; 2 Bro. Ch. C. 291; 1 Mer. 285. So, an express devise *for life*, of such intermediately acquired estate, to the person who is residuary devisee in the will, will not prevent the *reversion* from passing to the same residuary devisee, by force of the republication, 10 B. & Cress. 895, cited in Perk. Jarm. wills, 175.

§ 7. In relation to specific devisees, the doctrine must be received with more caution. On this point see Perk. Jarm. wills, 180—citing 2 Atk. 180; 2 Vern. 209; 2 Eden. 263.

*See also Amb. 97—1 Ves. 486—4 Bro. Ch. cas. 2—1 Mer. 285—7 T. R. 138—3 Ves. 405—7 Ves. 97, 499—*accordant*.

A legacy to a child, adeemed by subsequent advancement, is not revived by a constructive republication of the will by codicil. 2 Freem. 224; 1 Ball & Be. 298; 2 Russ. & My. 270; 3 My. & C. 376, 359; 2 Ves. 623; 4 ib. 610; 7 ib. 499; S. C. 12 Ves. 206—cited in Perk. Jarm. wills, 181.

A codicil, properly attested, may be a republication of a will, so as to give effect to a devise, otherwise void on account of the devisee being a witness to the original will. 6 John. Ch. 375.

§ 8. In conclusion, it may be added, that, "where a person makes a will, and afterwards revokes it by making another will, but does not actually cancel it, the cancellation of the second will, will operate a republication of the first. 3 Lomax, 102; 4 Burr. 2512; 2 Dall. 289; 2 Yeates, 170. The second will never operated, being only intentional. If the testator, by making the second will, intended to revoke the first, yet that revocation was itself revocable, and the testator did revoke it. 2 Ves. & Be. 122; 4 Burr. 512; 2 Dall. 289; 2 Yeates, 170. And, by a revocation of the second will, virtual or express, the former will, if subsisting, is revived. Cowp. 92; 3 Wils. 497; 2 W. Bl. 937; 3 Lomax, 103.

But where a person having made a new will, cancelled the former one, the cancellation of the second will not revive the former, for a will once cancelled can only be revived by a re-execution—3 Lomax, 103, citing 3 Atk. 798, and other decisions—even though a duplicate of the first will remain uncanceled. 13 Ves. 290; Cowp. 49; 3 Lomax, 103.

Where testator has revoked a will by an instrument in his own hand-writing, subsequent conversations of the testator with reference to a will being in existence, will not revoke the revocation. 3 Hen. & Munf. 562; 3 Lomax, 103.

§ 9. Republication may be fixed at a day subsequent to the time when a will was executed, if proved to have been made with due solemnities;* and although it may have been probated without reference to such subsequent republication. 1 Rand. 190.

*In Mississippi, our statute, unlike the English, requires certain solemnities to the revocation of a will; so the same solemnities are necessary to a republication of a will, as for its revocation. See 9 John. 312; 7 ib. 394. And a will, once revoked, can only be republished or revived by some express act. 1 How. 336.

§ 10. Where a testator altered his will by erasures and interlineations so as to make his devise extend to all lands of which he should die seized, and endorsed a memorandum to that effect on the will, stating the alterations which he had made, but the memorandum was attested by two witnesses only, *held* that the alteration was inoperative, and that lands acquired after the devise, descended to the heirs at law. 7 John. 394.

Where a person made a will in 1805, devising all his estate, and afterwards became seized of other land, and in his last sickness said he had disposed of *all* his estate by a will deposited with S, and that he did not wish to alter it, except to add another executor,—*held*, that this was no republication so as to include after-acquired land. 9 John. 312.

CHAPTER XII.

FOREIGN WILLS.

§ 1. Authenticated copies of wills, proved according to the laws of any of the United States, or the territories thereof, or of any country out of the limits of the United States, and touching or concerning estates within this State, may be offered for and admitted to probate, in said courts, (of probate;) but such will shall be liable to be contested in the same manner as the original (see H. & H. ch. 36, sec. 17,) might have been. H. & H. ch. 36, sec. 13, p. 388. As to granting letters thereon, see *Ibid.* sec. 14.*

*In Kentucky, under the laws of that State and the decisions of its Courts, a will with *two* witnesses is sufficient to pass real estate, and the copy of such will, duly proved and recorded in another State, is good evidence of the execution of the will. 1st Peters, 508.

But a testamentary paper, executed in a foreign country, even if so executed as to give it effect by the foreign law, cannot be made the foundation of a suit in a court of Equity, until probated here in the proper court. 12 Wheat. 169; 6 Cond. R. 500.

§ 2. A testamentary disposition of the testator's personal property, must have been made according to the law of the testator's domicile, at the time of his death. 2 B. Mon. 382, 138; 2 Blackf. 53; Story's Conf. 465; 4 Greenl.; 1 Scammon, 373—and other decisions cited in Perk. Jarm. wills, 2, note (1.)

This position respects only the *devolution* of property, and not the court of administration—the latter being always governed by *lex loci reisi*—Perk. Jarm. 2, note d.—the rights of legatees as well as of next of kin, in case of intestacy are governed by the law of the domicile of the intestate. 11 Mass. 264; 14 Martin, 99; 3 Paige, 182; 4 John. Ch. 460; 9 Mass. 355; 1 Mason, 381; 10 Pick. 100; 8 ib. 476; 6 Vermt. 374.

But a devise of real estate will not be good unless made according to the law of the place where the property is situated.—2 B. Mon. 382; 9 Wheat. 565; 18 Pick. 245; 1 ib. 81, 86; 2 Metc. 281; 1 Blackf. 372; 1 Wash. Ct. Ct. R. 204. The same rule applies to republished wills. 3 ib. 484.

A copy of a foreign copy, which last has been proved and recorded in a county court of Kentucky, may be given in evidence. 2 Marsh. 554.

A sworn copy of a will proved and recorded in the proper office of a sister State, is evidence here, as an unrecorded deed would be; but the proof must show that every requisite to make it a good will, according to *our* statute, has been complied with. 2 Marsh. 86–555; 3 Littel, 479. As to authentication, see 3 Marsh. 614.

The copy of a will regularly recorded in Virginia, where the testator lived, directing lands in Kentucky to be sold, may be recorded in the county where the lands lie; and although it would be irregular, the county court may grant administration thereon, with the will annexed, *before* the will is recorded, and such administration will confer competent authority to dispose of the estate, till avoided in the appellate court. 3 Marsh. 309—(8 Ohio, 239; 10 Ohio, 362, acct.) But it will not affect the ultimate destination of the property. 16 Mass. 433; 1 John. Ch. 153.

A certified copy of a nuncupative will, purporting to pass property in Kentucky, proved and recorded in Mississippi, is not sufficient to show that such a will has been made, as the laws of Kentucky required. 2 B. Monroe, 382. A nuncupative will must conform to the laws of the testator's domicile. *ib.* 383.

In Michigan, by revised law, a person residing in another State and owning land in this, may convey it according to the law of his domicile. Perk. Jarm. wills, 1, note.

In Ohio, a will made in another State where it is valid, but not in conformity to the laws of this State, passes no property here under act of 1831—but it is otherwise under the act of 1805, and 1840. 10 Ohio R. 362.

Respecting validity and probate of wills, made abroad and succession and distribution of *real* property of foreigners—See 3 Cranch. 319; 7 ib. 115; 3 John. Ch. 210; 4 ib. 469–470; 1 Binn. 336; 9 Mass. 337; 1 Mason, 408; 4 Greenl. 134; 2 M'Cord's Ch. 354–9; 3 Metc. 109–114; 10 Pick. 77, 108; 8 Pick. 475; 8 Mass. 506; 13 Pick. 8–23; 11 Mass. 256–264; 5 Pick. 370; 9 Wheat. 565; 1 Const. R. 292; 5 Gill. & John. 483; 22 Maine, 300; 11 New-Hamp. 88; 3 Pick. 128; 5 Cranch. 289; 1 M'Lean, 189; 8 Ohio, 239; 16 Mass. 433; 1 John. Ch. 153.

§ 3. A will devising land in one State, *may* be proved there, though pronounced void in another State. 4 Call. 89.

A will of a foreign state, if proved there so as only to be a will of personalty here, shall be so admitted; but if so proved there, as, if it were established here, it would be sufficient as a will of lands, it shall be so admitted here. 3 Leigh, 816.

As a general rule, however, the law of the place where immovable property is situated, will govern as to *capacity* of the testator, the *extent* of his *power* to dispose of the property, and the forms and solemnities necessary to give the will its due attestation and effect. Story Conf. of law, § 474, and notes; 4 Kent, 513; 2 ib. 429; 6 Monroe, 527; 4 Greenl. 138; 22 Maine, 303-4; 8 Ohio, 239.

§ 4. A will made in another State must be *interpreted* according to the law of that State. 2 N. Car. 129.

Where the will is to be construed by foreign law, the opinion of an advocate versed in that law, will guide the court; but if by a rule of construction common to both countries, the court will adjudge, without the assistance of such jurist. 3 My. & Cr. 559.

§ 5. A will devising lands made in a different State from that in which the lands lie, but registered in the latter, relates back to the date of the will, and it is wholly immaterial whether a suit is brought before or after registration. 11 Peters, 185.

A will made in Virginia, and duly proved and registered there, declaring the loan and limitation of property therein mentioned, which property was then in Virginia, is sufficient against purchasers, without registration, in Tennessee, under act of 1801—though the property may have been removed to Tennessee by the loanee and possession held for five years. 8 Yerg. 4.

In Ohio, a foreign will takes effect from testator's death. Its registration is only intended to admit a copy in evidence. 9 Ohio, 96; 11 Peters, 185. But until registration, no title to lands in this State will vest in the devisee. 6 Ohio R. 174.

A will, made in another State, will not authorize any person to intermeddle even with the personalty of the testator, in Ohio, unless proved in the latter State as directed by its laws. 9 Wheat. 565.

But where, a suit in one State, brings in question, *incidentally*, the title to land held under a devise, in another State, the will is evidence without probate, in the State where the suit is pending. 3 Mason's Ct. Ct. R. 508; 6 Mon. 523.

And where a will, made in another State, is *admitted to probate* in Ohio, it will pass lands in Ohio, though not executed according to the laws of that State; because the probate of a will, is a judicial act, and cannot be called in question, *collaterally*. 8 Ohio, 239; 10 ib. 362.

§ 6. An authenticated copy of a will, and of the probate thereof, in Kentucky, showing that it was proved there by three subscribing witnesses, but *not* stating the *substance* of the proof there, can be admitted to probate in Virginia, only as a will of personalty. 3 Leigh, 819.

Query? If the law of Kentucky was proved to be the same as that of Virginia on the subject, would the admission of a will to *full* probate in the latter State be a sufficient warrant of its admission to full probate as a will of lands, in the former State, without the particulars of the proof there, appearing on the record of the probate. 3 Leigh, 819.

A copy of a will proved in Louisiana according to the laws of that State, and offered for probate in Virginia, not authenticated according to the act of Congress, 1790, but according to the common law, is a duly authenticated copy within the statute of wills. 3 Leigh, 816.

§ 7. The law of Maryland, on this subject, is the common law of England; and where a probate of a will was offered in evidence, supported by evidence of the loss of the original will, from the office of the Court of Probates, it was *held*, that the jury were not bound by the probate to find for the will. 1 Harr. & McHen. 419. The clause of the Maryland act, 1798, is, "an *attested copy*, under the seal of office, of any will, testament, or codicil, recorded in any office authorized to record the same, shall be admitted in evidence in any court of law and equity, *provided* the execution of the original will or codicil be subject to be *contested*, until a probate hath been had according to this act."

In the case of *Darby vs. Meyer*, 10 Wheat. 472, the Sup. Ct. of

the U. S. in commenting on this act, say—"It is true that the generality of the terms in the first lines of this clause, *might, unrestricted* by the *context*, embrace wills of lands. The previous article in the same chapter, prescribes the formalities necessary to devise of real estate, and the previous sections of the 2d chapter indicate the means and impose the duty of delivering up wills of *all* descriptions, to the register of the court of Probates, for safe keeping, after the death of the testator, and until they shall be demanded by some person authorized to demand them for the purpose of proving them. But the act does not authorize the registering of any will without probate, *nor relate to the probate of wills, except wills of goods and chattels.*"

"The clause recited makes evidence of such wills only as are recorded in the offices of courts authorized to record them. But when the power of making wills is expressly limited to wills of personalty, we see not with what propriety, the meaning of the clause in question can be extended to wills of *realty*. The Orphan's court may take probate of wills if they affect personalty, even though they dispose of lands—but the will nevertheless is conclusively established only as to the personalty.* Unless the words be explicit or imperative to the contrary, the construction must necessarily conform to the existing laws of the State on the subject of wills of real estate.† And when the power of taking probates is confined to wills of personalty, we think the construction of the clause must be limited by the context."

"There is nothing in the clause recited, which under the Constitution makes the document offered *per se*, evidence, in a *land* cause. And there is no law in Tennessee which could make such a document good evidence under the laws of that State. 10 Wheat. 472.

§ 8. The common law doctrine on this subject, no one disputes.

*In Mississippi, the Court of Probate having exclusive jurisdiction as well of wills of *real* as of personal estate, the reason here assigned, does not apply to exemplified copies of its acts.

† Where the construction of a statute has been fixed by the Courts of the State, which enacted it, and the practice of the State Courts has been in conformity to such construction, the Sup. Ct. U. S. will relinquish its views in favor of the former. Otherwise, it will adopt its own views of construction. 10 Wheat. 470.

The ordinarys probate was *no evidence* of the execution of a will, in *ejectment*. Where the will itself was in existence and could be produced in evidence, it was necessary to produce it, but if lost, secondary evidence was necessarily resorted to. But whatever proof was made, was required to be made before the court that tried the cause—the *proof before the ordinary, being ex parte*, and the heir at law having had no opportunity to cross-examine the witnesses. Neither were the same solemnities required to admit the will to probate, as were indispensable to give it validity, as a devise of real estate.”*

“At first it was a subject of controversy, between the Common law, and the Ecclesiastical courts, whether a will containing a devise of land, should not be precluded from probate, although containing a bequest of personalty also; and the question was one of serious import, since the common law courts required the production of the original, whereas the consequence of probate was, that the original should be consigned to the archives of the court that proved it. This was at length compromised, and the practice introduced of delivering out the will, when necessary, upon security being given to return it.”†

*Whether the rule that a will of lands is subject to the laws and decisions of the State where it lies, is restrained by that clause of the Constitution which declares, that “full faith and credit shall be given in each State to the records, &c. of every other State”—and whether, therefore, “a will of lands duly recorded in one State so as to be evidence in the courts of that State, is thereby rendered evidence in the courts of every other State—*Provided*, the record, *on the face of it*, shows that it possessed the solemnities required by the law of the State where the land lies;” the court declined deciding in this case. 10 Wheat. 470.

† In Mississippi, it has been decided, that where a will made in another State is probated there, and a copy of the probated will is admitted to probate in this State, according to the statute—How. & H. 388—in a suit for a *legacy* under the will, brought in the Courts of this State, a *certified copy* of the probate of the will, from the Probate Court in this State, will be admissible evidence. 1 Sm. & M. Ch. R. 495.

CHAPTER XIII.

WHO INCAPABLE OF DEVISING?

§ 1. One disability to make a will arises out of infancy—and therefore persons under the age of 21, if a man, or 18 years, if a woman, cannot make a valid will. How. & H. p. 385.

In England, a male at 15, and female at 12, may make a will of personal estate, if proved to be of discretion. 2 Vern. 469. Other books say 17 and 18—Co. Litt. 89, 6—But as the common law has appointed no time, and this is a matter cognizable in the Spiritual court, which proceeds according to the civil law—by which law a will, by an infant of 14 years, of his *personal* estate, will not be controlled in Chancery or the temporal courts—the former is the correct opinion. 2 Mod. 315; 2 Ch. Rep. 382; 2 Eq. cas. ab. 283; S. C. Pre. Ch. 366; 1 Pick. 239. And such will would be good, though the person afterwards arrived at age without confirming it. 4 Ves. 160. By stat. of Charles 2d, infants were allowed to appoint a testamentary guardian for any child under 21, and not married; and gave to such person the custody of the infant's estate real and personal. This guardianship drew after it the custody of the land, which the father could not devise. Vaugh. 178; P. Wm. 102.

It has been thought, but not determined, that if an infant devises the guardianship of his child, (by stat. Ch. 2, c. 24,) such a disposition will carry with it the land, as incident to the guardianship. Vaugh. 177; 2. P. Wm. 102; 1 Jar. Pow. dev. 127, cited in 3 Lomax, 8.

§ 2. Another disability is that arising from idiotcy. 26 Wend. 255. Whether idiot or not, is clearly referable to the circumstances of each case. And if such a one make his will ever so wisely it is void.

One deaf and dumb from nativity is presumed to be an idiot, but this may be rebutted; and if he seem to understand what a testament means, and has a desire to make one, he may by signs and tokens declare it.

A person once able to hear and speak, by some accident has become deaf and dumb, may, if he can, write his own testament,

with his own hand—but if he be not able to write, he will in all respects be regarded as one deaf and dumb by nature.

Such as can speak and not hear, may make their testament as if they could both speak and hear. Such as hear and do not speak, if they can write, may make their testaments themselves, by writing—if they cannot write, by signs sufficiently known by those present. 1st Wm. on ex'rs. (2d Am. ed.) 15, 36.

§ 3. Another disability is that arising from the restraint, duress, or menace of imprisonment of the devisor. 1 Tuck. Com. pt. 2, 290. This though not expressly provided against in the statute, seems necessarily to be implied from the words of the act, "at his will and pleasure;"—and consonant thereto, it was held by Roll. C. J. in a trial at bar, that if a man make his will in his sickness, (by the over importuning of his wife,) to the end that he may be quiet, this would be a will made by restraint, and therefore not a good will. 3 Lomax, 10, and note 2.

But there must be actual proof of some undue importunement of, or restraint upon the devisor, or the law will not avoid a will regularly made. Dyer, 143; Raym. 334; Sty. 427; 1 Ch. R. 66; Com. dig. Tit. Devise H. 1; Rep. Ch. 125; 3 Ch. C. 103, cited in 3 Lomax, 10.

§ 4. As to insane persons, see post.—title, *sanity of testator*.

§ 5. Every person not embraced in the class of persons disabled by the statute, may make a will, be his understanding ever so weak. 26 Wend. 255.

A testator need not be capable of managing his business generally; it is sufficient, if in making his will, he understands what he is doing. 9 Conn. 102; 26 Wend. 255; see 8 Conn. 254; 8 Watts, 66; 1 Paige 171; 8 Mass. 371; 1 Yeates, 108; 3 Knapp. Pro. Com. 122.

§ 6. In Pennsylvania, a feme covert cannot dispose of lands either with or without her husband's consent. 10 S. & R. 84—So in New-Hamp.—5 N. H. 205.

The disability of coverture differs materially from that of infancy, idiocy, or lunacy; it being the creature of civil policy, and not arising from any natural infirmity. And therefore this disability may be removed by the contracting parties through whom the property is derived—so far as the *jus dispensandi* is concerned—but

in the case of infancy, idiocy, and lunacy, any such attempt would be abortive. 3 Atk. 897; 2 Ves. Sn'r. 298—cited in 1 Jarman on wills, 33.

In England, a *feme covert* cannot devise lands, nor can she bequeath chattels without the consent of her husband. And such a will being a nullity, will not be admitted to probate in the Ecclesiastical courts. For all her chattels are absolutely his, and he may dispose of them, as his own, if he survives;—it would be inconsistent with this power, to allow the wife to bequeath them. 1st Wms. ex'rs. (2d Am. ed.) 42 to 48.

But as the husband has no interest in chattels held by his wife, as executrix, the law allows her, in respect to these, to make a will, without her husband's consent. *Ibid.* So, she may appoint an executor without her husband's consent. Moor. 340; 2 And. 92; 1 Mod. 211, 212; 2 East. 556.

And as the husband may waive the interest which the law gives him, he may authorise his wife to dispose by will of her personal estate: But he must consent to the particular will, which she had made, and this consent must be given when it was proved—for he may revoke it at any time before *probate*. *Ibid.*

But this consent may be implied; and if after her death, he consents to, or acts on the will, he cannot oppose the probate;—and but little proof will be required of a continuance of his assent to a will made with his express consent. *Ibid.* 2 Mod. 172; Eq. cas. abr. 66. If in the hand-writing of the husband, it is a sufficient indication of his assent, though not republished after his death. 1 Des. 366; 2 ib. 66—see also 1 Iredell, 514; 2 Kent, (5th ed.) 170; 4 ib. 505; 4 Har. & J. 446.

But such will is only good against him, in case he survives; and not against her next of kin, if his wife survives him, as to property she acquired during coverture. But she may after his death, make it operative, by republication. *Ibid.* A will made by wife during coverture, with her husband's consent, cannot pass property acquired after his death. 1 Wms. ex'rs. (2d Am. ed.) 42, 48; 5 East. 552; 15 Ves. 139.

Jus disponendi is an incident to personal estate; therefore a married woman owning personal estate, in her separate right, may dispose of it by will. 3 Rand. 373.

So of its accretions and produce. 1 Ves. Jr. 46; 3 Bro. Ch. cas. 8; 2 Vern. 535; 3 P. Wms. 338—(But see 5 Ves. 79; 2 Swans. 62; 1 Freem. 304.)

A feme covert may under certain circumstances, dispose of her property by will—5 B. Monroe, 370—of land as well as personalty. 12 Mass. 525; 5 N. Hamp. 205; 10 S. & R. 445; 1 M'Cord, 225; Powell on dev. 450. A husband may bind himself by agreement or bond to permit his wife to dispose of her property by will during coverture, and he will be bound. 1 Vern. 244, 245; 2 ib. 329.

A woman owning land may before marriage, by deed convey her land to trustees in trust, for her own separate use during coverture and afterwards, for such person, as she shall by writing in the *nature of a will*, appoint—and in default of such appointment to her heirs;—and if she afterwards make such appointment, it will be a good declaration of the trust—3 Rand. 378; Pow. on dev. 134; Sugden, ch. 4, sec. 1—and such reservation may include all lands devolving on her after coverture. Amb. 565; 2 Sch. & Lef. 456;—and there is no difference in this respect between legal and equitable estate. *Ibid.* See also 2 Dallas, 199.

But if the legal estate remains in her, and there is only an agreement between her and her husband, that she may dispose of the land by deed or will, such disposition, though it may bind the husband, will be void, as against the heir. 2 Ves. 190; 1 ib. 301; 2 Bro. C. C. cas. 534; 1 Madd. Ch. 375. But it will not then operate as a will, but as a gift from the husband. 1 Mod. 11.

So if land be given to a married woman, she has no power to dispose of it, though given to her sole and separate use—*unless*, the devise to her, gives her express power to appoint by deed or will the person who shall take, notwithstanding her coverture. *Ib.*—And the intervention of trustees is not material. *Ibid.*

A feme covert's will made under a power, if obtained by marital authority and undue influence, contrary to her real wishes and intentions, is void, and not entitled to probate. 1 Wms. ex'rs. (2d Am. ed.) 42, 48.

A woman whose husband has abjured the realm, or been banished for life, is in England a feme sole, and may make a will. 1 Inst. 133; 2 Vern. 104; Pew. dev. 148; 2 Desaus, 244; 3 Balst.

188; 2 Ross prop. 123; 3 Lomax, 9; 2 Bro. Ch. C. 385. For as he is civilly defunct, she is restored to her rights and privileges of a *feme sole*. 2 Vern. 104.

The Court of Probate is bound to consider, whether the power has been duly executed, before giving it the sanction of its seal. But if there be doubt, it is the safer course to admit the paper to probate, inasmuch as such probate will not alone be sufficient to induce a Court of Equity to act upon it; but if the Court of Probate reject it, its sentence would be final. Wms. ex'rs. (2 Am.ed.) 42 to 48.

In Kentucky, it has been decided that "if a power to a feme covert to dispose of land by will is shown to the Probate Court, on her will being offered for probate, the court cannot inquire if that power has been properly exercised. And an agreement, by the husband, *after* marriage that the wife shall have such power to dispose of property held by her before marriage, is *prima facie* valid; and in such case it is proper to order to record also, the instrument conferring the power. 5 B. Monroe, 376.

See also 15 Ves. 139, 154; Doug. 707; 3 Atk. 156; 1 Burr. 431; 2 Bro. Ch. C. 392.

Courts of Equity will effectuate dispositions by femes coverts, in the nature of appointments under marriage articles, both against her husband and her heirs. And it is no objection that the wife's devisees are strangers in favor of whom equity would not have supplied the defective execution of a power; nor is it material, as *between the parties themselves*, whether the articles were made before or after marriage, with this qualification, that the heirs cannot be affected by the wife's contract during coverture. 3 Rand. 373.

§ 7. If a person laboring under any one of the foregoing disabilities, make a will, and afterwards the disability be removed or cease, the will is not thereby made good; for it was void in its inception, and the rule is, that the deviser must be capable at the time of the execution of the will. Rob. on wills, 30; Pow. dev. 140; Dyer, 143, 6; Anderson R. 182; Ca. T. Holt, 246; Ib. 747; 11 Modern, 157; 2 Eq. ca. abr. 357; Comb. 84; 2 Vernon, 475.

But if the will had been *republished* after the disability ceased,

it would thereby become valid. 1 Salk. 238—(and see Republication, *ante.*) and 2 Vern. 475.

And if the will had been made before any such disability existed, the subsequent occurrence of any such disability would not have impaired it. 2 Munf. 209.

CHAPTER XIV.

WHO MAY BE DEVISEES.

§ 1. All *natural persons* who are *in esse* at the time when the will is made, and capable of acquiring lands by purchase, may be devisees. Jarm. Pow. on dev. 254.

And though once doubted, it is now settled that an infant *en ventre sa mere* may be devisee. 1 Jar. Pow. dev. 260, 263; 2 H. Bl. 399; 2 Bro. Ch. ca. 320, S. C.; 2 Ves. Jr. 673; 5 S. & R. 38; 4 Ves. 334; 2 Ves. & Be. 367, cited in 3 Lomax, 11; Raym. 163; Freem. 244. And the freehold shall not be in abeyance, but shall descend in the mean time to the heir at law. *Ibid.*

§ 2. A *married woman* may be a devisee—Lit. S. 168; 1 Inst. 112—even of her husband, because it takes effect only after his death. *Ibid.* Co. Litt. 112; Roll. ab. 610. And though a devise to a wife against the consent of her husband, will be void at law, yet equity will interpose in such a case and save to the wife the benefit of such devise. Jarm. Pow. dev. 254.*

§ 3. An alien may take by devise, but in England it is doubtful for whose benefit. 2 Ves. 362; Noy, 137.† See Descent.

* A devise to A and wife and their heirs, makes the devisees tenants in common. 2 Ohio repts. 306—9 Mass. 161.

† In Virginia, all persons who migrate thither, (not being alien enemies,) and declare their intention to reside therein, are entitled to purchase and hold lands, as citizens can do. Acts, 1833.

In Virginia it has been held on the principles of the English law, (independent of statute,) that an alien whether friend or enemy, might take by devise as well as by grant, and would be capable of conveying, before office found.

§ 4. A bastard may be a devisee of land. 1 Pow. dev. 266; Ram. wills, 50, 52, cited in 3 Lomax, 11.

But if a person devise to a *born* illegitimate child of A, the father or mother—it must be *reputed* at the time of the devise, the child of A—and this may be proved by *parol*.

But parol proof cannot be admitted to prove that the testator intended to include an illegitimate child. This must be manifest from the will itself. 1 Ves. & Be. 422; 1 Mad. R. 430; 2 Pow. dev. 343; Turn. & Russ. 310.

Neither can proof be allowed that a person *is* the illegitimate child of A, but only to show that he was so *reputed*—for if the former were allowed, indecent evidence might be introduced. Therefore where A devised “to the child of which A is *enceinte* by me,” the gift failed. 17 Ves. 528; 1 Mer. 152; 1 Ves. & Be. 435. But if an illegitimate child, *in ventre matris*, be described as “*the* child of which A B is now pregnant,” it may take under such description. 1 Mer. 141; 2 Pow. dev. 359—See also 1 P. Wms. 529.

§ 5. A devise to an unknown person upon a certain future event may be good—as to such person as shall marry the daughter of A. So a devise to a person not in existence may be good—as to the first son of A B, who then has no son—and this by way of remainder, or executory devise. 1 Jarm. Pow. dev. 260; T. Raym. 82; 2 Ves. & Be. 367; Raym. 162; Freem. 244; Fearne’s Cent. rem. 428; Salk. 227.

§ 6. In England, the statute of Henry 8th forbade a corporation to take by devise, because they never answered the feudal services, and were restrained by the statute of mortmain. Roll. abr. 608. In the United States a corporation may take for charitable purposes—provided the trust be not foreign to the purpose of its incorporation, and provided the beneficiaries be certain and definite. See 4 Wheat. R. 1; 3 Leigh, 450; 11 Mass. 419; 2 Russ. & My. 107. But see 4 Kent’s Com. 507, 508, and 5 Russ. 112. In the last case, the devise was to Guernsey hospital—there being two

hospitals there—the legacy was held good for charitable purposes.

§ 7. If a devise be made to an unincorporated association, in trust for the education of youth who shall appear promising for the ministry, “or such like purpose,” the association cannot take such trust, as a society, because not incorporated. 4 Wheat. 372; 12 Mass. rep. 537. Nor could the bequest be taken by them as private individuals, because no benefit was intended to them. Nor could the trust be executed by them as private individuals, because *it* was devised to the association. 4 Wheat. 372—See also 3 Leigh, 450.

CHAPTER XV.

SANITY OF TESTATOR.

§ 1. Mad folks, and lunatic persons, *during the time* of their *furor* or insanity of mind, cannot dispose of any thing by will, because they know not what they do. For, in making testaments, the perfectness and integrity of *mind*, and not health of the body, is requisite;—and thereupon arose that clause, “sick in body, but of perfect mind and memory.” Swinb. on wills, 76; 1 Peters Ct. Ct. repts. 163. If a lunatic or mad person make a will during insanity, and afterwards recover his reason, such will is not thereby rendered valid. But, if a man of good and perfect memory make his will, and afterwards become insane, the will is not thereby revoked. Swinb. 67.

The question of sanity is a question of fact peculiarly for the decision of a jury, and the party alleging the insanity of a testator, for the purpose of impeaching his will, must establish it by the most clear and satisfactory evidence. 3 Humph. 278. For, the law always presumes sanity, or perfect mind and memory, till the contrary be proved—Swinb. 77—and the burden of proof

rests on those affirming the insanity of a testator or testatrix. *Ib.* And see also Const. repts. So. Car. 225; 1 Peters C. C. repts. 133, 153; 5 John. repts. 144; 1 Mass. repts. 71, 335; 4 *ib.* 593; 6 *ib.* 397; 8 *ib.* 371; 12 *ib.* 488; 7 Pick. 94; 9 *ib.* 39; 18 *ib.* 115; 4 Wash. C. C. repts. 262; 3 *ib.* 580; 1 Metf. 204, 211; 1 Green's Ch. repts. 8; 4 Eng. Eccl. repts. 181.

But if the testator, prior and subsequent to the date of the will, be insane, *proof* of his competency *on the day* the will was executed will render the will valid. 4 How. (Miss.) repts. 459, and the foregoing authorities, *passim*. And in case of such *prior* insanity, the burden of proving the sanity of the testator, at the date of the will, is shifted upon those who set up the will. 4 Call, 423; 4 Wash. C. C. repts. 262; 5 John. repts. 144; 1 Green's (N. J.) Ch. repts. 8; 17 Mass. 188; 10 Pick. 378; 1 Metcalfe, 221;—See also English decisions—3 Bro. Ch. C. 441; 13 Ves. 87; 1 Phill. 100; 1 Eccl. repts. 47.

But evidence of insanity *long after* the making of the will, is not admissible, to shift the burden of proof from those alleging insanity. 9 Mass. 225. Though acts of insanity occurring *after* the execution of the will, may be proved and reflect back upon acts otherwise equivocal, about the time of the will. 5 Eccl. rep. 223, 188; 3 *ib.* 270, 109.*

If a "lucid interval" at the making of the will be proved, the will is thereby rendered valid, if otherwise perfect and legal.—Swinb. 76, and the foregoing decisions *passim*. Even though testator be under guardianship, as *non compos*. 12 Mass. 488; 18 Pick. 115; 9 Ves. 610.

Great caution must be observed in admitting proof of "lucid interval," after the prior insanity of the testator has been established. 1 Phillim. 82; 2 Add. 445; 3 *ib.* 210; 1 Wms. on ex'rs. 18.

If a lunatic wrote his will, in his own natural manner, and its provisions are sensible, proper and judicious, the will itself proves

*Where there was evidence of delusion, and other *indicia* of derangement, existing shortly before, as well as *after* the acts, proof of calmness, and of his doing formal matters of business, under the sanction of his family, are not sufficient to rebut the presumption against the papers. 4 Eng. Eccl. repts. 181.

that when he wrote it he had a lucid interval.* 9 Dana, 443. It is a rational act, rationally done, and nothing is left for presumption against a lucid interval—1 Phill. 90—And it is sufficient if the lucid interval be long enough to do the rational act intended. *Ibid.*

An inquisition of lunacy is competent testimony, on a question of sanity, but not conclusive. 1 Green's Ch. rep. 8. It will, however, raise a presumption of incapacity to make a will. 18 Pick. 115. But his guardian may show that he was sane. *Ibid.*—and see 12 Mass. 488.

Sanity of mind, or a disposing memory, is *not* such a memory only as to make proper answers to common and familiar questions, but to be able to dispose the estate with intelligence and reason. Swinb. 77, 82, (9)

The testator must have had *at the time* of making his will, that soundness of mind and memory, enabling him to understand the *nature* of the instrument signed and sealed, the *relative situation* of his family and connections, the *general extent* of the property disposed of, and that it was disposed of agreeably to his desire. Southard, 670, (N. J.) A disposing mind or memory is the capacity of recollecting, discerning, and feeling the relations, connections and obligations of family and blood. South. 458.

A testator must have *memory*—but though his memory be *too imperfect to direct* the terms of a *contract*, he may yet be competent to make a will.† 9 Connt. 102; 4 Wash. Cir. Ct. repts. 262.

*And a memorandum made out by the testator, concerning his unsettled business, for his executors, proving substantially correct, in all its particulars, strengthens the conclusion resulting from the intrinsic propriety of the will. 9 Dana, 441, 442—See also 1st Phill. 90.

An inference in favor of the validity of a will, drawn from the fact that many of its provisions are like those of a former will, executed by the testator when he was undoubtedly of a disposing mind—is more than rebutted by the fact, that the pretended last will bears a still closer resemblance to a paper purporting to be a will, signed by the testator when he was clearly not of disposing mind. 1 Dana, 164.

† In *Groom vs. Thomas*, 3 Eccl. repts. 191—Sir John Nichol says—"In this case the deceased did not 'reword'—he varied, added, and omitted, without any change of circumstances to account for these fluctuations of intention. It is impossible to surmise what fancy a deluded imagination may take up and act on; and on that very account the law has wisely ordained, that where any delusion exists at the time, *it is not necessary to connect that delusion with the act done*, and which it is sought to avoid. Here indeed the fancies of the deceased were not wholly connected with the testamentary disposition. He fancied *his nephew wanted to murder*

And it should appear that the testator had a sound and disposing memory, (i. e.) that he was capable of making his will with an understanding of what he was doing, a recollection of the property intended to be disposed of, of the objects of his bounty, and the manner of distributing his property. 1 Peters Ct. Ct. repts. 163. It is *not* necessary that he should view his will in its *legal* form, or comprehend it in that way. It is enough if he understands the elements of which it is composed, and the disposition of them in their simple forms. *Ibid.* He should be able to make *intelligible* to the scrivener the *dictates* of his *mind*—for it is the soundness of the mind and not of the body which is to be regarded. *Ib.* See also, 8 Mass. 371; 8 Connt. repts. 154; 9 ib. 102; 2 B. Mon. repts. 74.*

However inferior the capacity, or weak the understanding, whether it arise from natural or adventitious causes, if a man possess mind sufficient for the transaction of ordinary business of life, there can be no question but that he can make a will. 1 Bail. S. C. repts. 92. Although the mind of a testator may have been greatly impaired by disease, his minute recollection of instructions given for preparing his will twenty-four hours before, is wholly inconsistent with that imbecility and alienation of mind which incapacitates for making a will. *Ibid.*

Evidence that a testator had diminished a large estate, is no evidence of his insanity, or that he was of unsound mind, or incapable of devising. 17 Pick. 373. On the other hand, capacity to make property and to take care of it, is evidence of sanity, but not conclusive. 3 Humph. 278.

Suicide is not *conclusive* evidence of insanity, but is admissible evidence to show the absence of a sound mind. 4 Humph. 191—See also 7 Pick. 94.

him—he quarreled with his brother—they were displaced from being executors and residuary legatees—they have a very inferior benefit—he might not be perfectly consistent in leaving them any thing, and in doing the act itself, he might be so apparently rational as not to expose his derangement of mind to the sol'r. who had no previous suspicion of it. 3 Eccl. Repts. 191.

*The testator may not have sufficient strength and vigor of intellect to make and digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. The question is this—Were his mind and memory sufficiently sound to enable him to know and understand *the business in which he was engaged*, at the time of making his will? 4 Wash. C. C. repts. 466-7.

It is a fact universally known that a person may be *non compos mentis*, and yet possess great vigor of intellect, unusual power of reasoning, peculiar subtilty and shrewdness, and a strong recollection of all the relations he stands in to others, as well as of all the acts and circumstances of his life. His mind is, however, *unsound*, by reason of the delusive sources of thought. All his deductions, *within the scope of his malady*, being founded on his assumption of things as realities, without any foundation, or so distorted and disfigured by fancy, as, in effect, to amount to the same thing. 8 Connt. repts.

Where a man had a groundless hatred towards his relatives and great fear of them, apprehending that they would attempt to get his estate from him before his decease, and that they were lying in wait for him to shoot him, proceeding from *partial* derangement, though sane on other subjects, and under this partial derangement, made his will, seeming to the witnesses to be in his right mind, the will was rejected by the Court, for want of testamentary capacity in the testator. 1 Littell's repts. 371. But where a will is written wholly by the testator, and well written, and makes only such disposition of his property as is consistent with the affections, duties, objects and principles, which he has always avowed and professed when his sanity was unquestioned and unquestionable, it is the *best* evidence that he was possessed of a disposing mind when he wrote it. 9 Dana, 441.

Care must be taken not to confound a *weakened* intellect with one that is lost, and that *singularity* be not taken for insanity.* 9 Connt. repts. 102. See 1 Bail. S. C. repts. 92.

*There are many circumstances, which though not of themselves establishing actual insanity, which had not before become decided, are still strong *indicia* of its continuance—such as great irritability, violent passions, occasionally deep depression, eccentric habits, suspiciousness, inconsistency, changeableness and the like. If actual insanity has never existed, many or most of these circumstances may occur, and yet not establish positive derangement. But where actual insanity has existed previously, lighter things become confirmations. 3 Eccl. repts. 186, in case of Groom *vs.* Thomas.

Religious impressions producing extreme anxiety, even to hopeless despair, caused by a conviction that the sufferer had lost his day of grace, and so overwhelming as to render him unconcerned and listless on all other subjects, may exist consistently with an unimpaired wisdom, and of course does not justify the conclusion, that one so affected is incapable of making a rational and valid will.—And if when his attention can be diverted to other things, he is rational and sensible, *as to them*, it tends strongly to prove, that his mind is not unsound. 9 Dana, 440.

Greatness of testator's age is not proof of his incapacity to make a will. A man 100 years old may be very competent. 4 Call, 423. If a testator be 86 years old, and dictate his own will, and the provisions of it manifest intelligence and sound moral sentiments, and be not procured by duress or other undue influence, the will should be sustained. 2 B. Mon. repts. 74. So, if he be rational in all his acts and conversation, and superintend with care and intelligence all his domestic concerns, litigations, contracts for hiring and the sale and purchase of land and negroes, though his *physical* energies be impaired, he has capacity to make a will.—*Ibid.* 79. But it is otherwise if the testator had grown *childish* with age. 8 Connt. repts. 39.

People of mean understanding and capacities, neither of the wise sort or the foolish, but indifferent betwixt both, even though they rather incline to the foolish sort, are not hindered from making their wills. The law will not scrutinize into the depth of a man's capacity, particularly after his death, if he was able to conduct himself reasonably in the common course of life; as it might be opening a wide door to support pretensions of fraud or imposition on the testator. 4 Coke, 61.

One, overcome with drink, is equally incapable of using his reason, during his drunkenness, as a madman. And therefore, if he makes his will at that time, it is void. 2 Com. C. 32.

The law considers drunkenness as voluntary madness, and a person in that state can no more make a valid testament than other madmen or lunatics. If a man be partially intoxicated and exhilarated with liquor, and his understanding somewhat clouded and obscured, he may make a good testament; but he who by a continued custom of toping, or by an excess of drunkenness, has exiled his intellects in such a manner that he has totally lost the *rational*, and reserved nothing but the *animal*, is altogether incapable of making a valid testament. Swinb. 74.

Drunkenness, merely *of itself*, is no legal exception to the va-

A belief that there are degrees of happiness in a future state of existence, and this happiness was in proportion to the amount of property a man had acquired here, and the charitable use he had made of it, constitutes no evidence of insanity. 3 Humph. 278. No religious creed can be regarded as insanity, there being no test by which their truth can be ascertained. *Ibid.*

lidity of a will, unless it absolutely disables the party from disposing of his estate with reason and intelligence. 2 Yeates, 48.

The *time*, to which enquiry into the sanity of the testator must be directed, is the time of executing the will. 3 Wash. C. C. rep. 580; 4 Call, 423; 9 Conn. 86; 9 ib. 102—But see 1 Littel, 102, & 1 Mass. 71.

SANITY—WHAT PROOF ADMISSIBLE.

On a question of sanity, and capacity of the testator—his declarations, *at the time* of making the will, may be given in evidence. 2 Southard, 589.

Where the capacity of the testator is doubtful, the reasonableness of his will, is a circumstance in favor of his capacity; and in judging of its reasonableness, due allowance must be made for the caprice, which even a wise man has a right to indulge, in the disposition of his estate. 1 Bailey's S. C. repts. 92.

The testamentary witnesses, their opinions, and the facts they state as occurring *at the time* of the execution of the writing, are to be particularly regarded by the Court. 8 Green's Ch. repts. 8. The opinions of *other* witnesses as to the capacity of the testator, are the *slightest* kind of evidence, except so far as those opinions are based on facts and occurrences, detailed before the Court. 9 Mass. 225. The subscribing witnesses to a will, may testify, as to the *opinion they* formed of the testator's mind, *at the time* of executing the will. 3 Mass. 330.

But only the subscribing witnesses can give their *opinions* merely, without stating cause, as to the state of testator's mind. 9 Yerg. 329. Other witnesses must state only the *appearance* of the testator and particular facts. 3 Mass. 330; 4 ibid. 593; 8 ibid. 371.

Generally, witnesses must state facts, and it is the province and business of the courts, from these facts, to decide, upon settled rules and guides, whether the testator is competent or not. 9 Mass. 225; 9 Yerg. 329. And the *opinions* of witnesses, who are physicians, are generally inadmissible to prove the insanity of the testator, unless they be predicated on facts testified by either of them or by *other* witnesses. 9 Mass. 225. The opinions of physicians must also be accompanied by a statement of the *symptoms* and circumstances on which they found them. 9 Yerg. 329.

But having stated the facts, witnesses may then state the opinion they have founded on them, and the inferences they have drawn from them. 9 Yerg. 329.*

It is laid down in Comstock's Digest, that one witness is not sufficient to prove a man mad; nor two, in case the one testify of the testator's madness at one time, and the other of his madness at another time. But both agreeing in time, if then one witness testified of one mad act, and another of another mad act, *at one and the same time*, these sufficiently prove that the testator was then mad, tho' they do not both testify of one and the same mad act. Comstock's dig. 23—citing Godolph 23, 24, & Swinb. 67.

The concurring opinion of a Judge and Jury in favor of the capacity of the testator, would, even in a doubtful case, be conclusive, although opposed to the opinions of his physicians and other intelligent witnesses. 1 Bailey's S. C. repts. 92.

FRAUD—DURESS—OR UNDUE INFLUENCE.

§ 2. In making a good will, it is necessary that the mind of the testator be free from fraud, fear, compulsion, or other undue influence. For when a testator is moved by fear, circumvented by fraud, or overcome by immoderate flattery, to make his testament, the same is void, or at least voidable by exception. Shepherd's Touch. 405.

In objecting to the probate of a will, the objector is not confined to enquiring into the testator's sanity and signature, but may go into evidence of *fraud* in obtaining the signature. 6 Call, 90.

Where undue or improper means are used to procure the will to be made, to the injury of parties who did not complain, the will *ought not* to stand, although it may appear that the testator always intended to disinherit the parties contesting the will. 6 Yerg. repts. 272.

But if after the fear has passed away by removal of the cause, or after the compulsion has ceased, and the fraud discovered, the testator confirm the testament, it may in such case be valid. Shep. Touch. 405.

*In an attempt to set aside a will because the testator was of unsound mind, and unduly practised on evidence was admitted of the declarations of one of the executors, who was also a legatee, and one of the parties to the record, as to facts which occurred at the time of making the will. 1 Pick. 192.

The influence acquired over a testator by kind offices, *unconnected with any fraud or contrivance*, can never *alone* be a good ground of setting aside a will. *Such* influence is lawful and proper. 1 Green's Ch. repts. 8. The influence, *thus* acquired, tho' exerted over a testator 80 years of age, whose bodily faculties are impaired, and who without good reason, entertains feelings of hostility to his family, cannot invalidate the will. *Ibid.*

A man may by *fair* argument and persuasion induce another, to make a will, even in his own favor. 3 S. & R. 269.

Arguments and persuasions used by testator's children, to induce a devise to a brother's or sister's children who are poor, is an influence worthily exerted, free from selfishness, and should not condemn a will. 1 B. Mon. rep. 352.

A testator may be aided by the views of others in coming to a just conclusion as to the manner of disposing of his property by will; and the influence thereby exercised, *unless it be an interested* one, cannot be deemed an undue influence. 1 B. Monroe's rep. 353.

A verbal departure from the instructions of the testator, in one of the clauses of his will, which had not been read over to him before execution, does not necessarily vitiate the *whole* will, although it enlarge the subject of a devise, or create a latent ambiguity in the particular clause. In a question of probate it is entitled to its due weight as a circumstance of fraud or imposition, but it is not conclusive. 1 Bail. S. C. rep. 92. Where the capacity of the testator is doubtful, there must be proof of instructions or reading over. *Ibid.*

WHAT PROOF OF FRAUD, ETC. ADMISSIBLE.

§ 3. Parol evidence is admissible to prove that a testator executed his will under *duress*, but not his declarations of that fact. 2 John. rep. 31. So, that he executed under the influence of *fraud*, for to exclude such evidence in such case, would make a rule intended mainly to prevent injustice, instrumental in producing it. 8 Durn. & East. 147; 9 Ves. 519; 5 Watts, 200; 1 Bland, 397.

In an issue of *devisavit vel non* it was *held*, that the declaration of the supposed testator, made *after* the execution of the will, were admissible to prove that the will was obtained by *fraud*,

notwithstanding the act of 1819, "to prevent frauds in the revocation of wills—(Daniel, Just. dissenting from the opinion)—unless the declarations were made at the time of executing the will, when they might be admitted as part of the *res gesta*. 3 Dev. (N. C.) 442.

Parol evidence is admissible to prove that the instrument offered for probate never was, in reality, the will of the decedent—4 Dev. (N. C.) 228—So, to rebut a resulting trust,—for this is not in contradiction of the will, but against a mere equity arising by mere implication of law. 14 John. 1; 5 Wend. 580; 4 ib. 443; 2 John. Ch. 416; 10 Ves. 360; 4 Har. & John. 551; 7 Mart. (Lou.) R. 243; 3 Mason, 362, 363; 3 Littel, 399; 4 Watts & Serg. 149; 2 Fairf. 1; 4 Kent, (5th ed.) 305; 2 Story, Eq. ju. sec. 1212.

§ 4. Where any influence has been used to procure a will, the jury must decide whether it was by fair and reasonable means, or by unfair and fraudulent ones. If the former, they should find for the will; if the latter, they should find against it. 2 Haywood, 411.

And where there is any evidence of fraud or imposition in obtaining the will, the jurors may consider the disposition of the property actually made therein, to guide their judgment in making up their verdict. 1 Iredell, 209.

§ 5. A will may also be *void* on account of fraud on the part of the testator—as, if A buys a slave and the bill of sale is made to B, and B devise the slave to trustees for A's use, for life, with remainder to C—all with the intent to hinder delay and defraud the creditors of A—it is fraudulent as to said creditors, and C takes nothing by the devise—4 B. Mon. rep. 68—and such slave will be liable for A's debts. *Ibid*.

CHAPTER XVI.

WHAT EMBRACED IN A WILL?

§ 1. A will should be *construed*, as at the instant of the testator's death, and should not be varied by subsequent circumstances. 2 Cōwen, 333.

But in regard to its *effect* on the testator's real estate, a will speaks only from the date of its execution. 8 Cranch 66, and note to Perk. Jarm. wills, 277.

§ 2. It was the settled rule of the English law, that the testator must be seized of the land devised at the time of making his will, and the testator must also continue seized thereof until the time of his death. 1 Ves. Jr. 254; 8 ib. 295; 10 ib. 597, 605; 4 Kent, (5th ed.) 510, 511; 4 Greenl. 341; 5 John. Ch. 441; 3 ib. 307, 310, 312; 1 M'Cord, ch. 32; 7 Har. & John. 320; 4 Rawle, 323. In the last case it was decided that this was the rule in Pennsylvania, although the testator declared in a codicil it was his wish and intention that all the real estate he should thereafter possess should pass by the said will.

This doctrine extends not only to legal, but to equitable interests; and after-acquired lands, whether conveyed to the testator himself, or to trustees for him, descend, at his death, to the heir at law. 1 Salk. 237; 2 P. W. 629.*

§ 3. This same rule prevails in Maine—4 Greenl. 341—And in Alabama—2 Ala. N.S. 712—And in Connecticut—15 Conn. 274 And North-Carolina—3 Iredell, 536.

In Virginia, the intention to pass after-acquired land must clearly appear on the face of the will. 8 Cranch, 66; 3 Call, 289; 1 Wash. 75; 2 Munf. 200. So in Massachusetts—6 Mass. 149; 3 Pick. 217; 24 ib. 129; 5 ib. 114. And in New-York—Rev. stat. N.Y. 57. And in Kentucky—7 J.J. Marsh. 58. And in Ohio—4 Ohio, 115. See further, 4 Kent, (5th Am. ed.) 510.

*This rule has been changed in England by statute of 1838, so as to permit a devise to operate on after-acquired lands. Perk. Jarm. wills, 43.

In Mississippi, the act regulating wills allows a person to devise all lands "he or she hath, or shall have at the time of his death"—(see page 43, *ante*.)—and it is therefore presumed that the rule last mentioned, and not the English rule, prevails in this State.

§ 4. The presumption, however, is, that the testator meant to embrace, in his will, only land held by him at the execution of the will—8 Cranch, 66—except where there is a codicil, confirming and re-publishing a former will, in which case land acquired between the date of the will and of the codicil, will pass. 3 Mason's Ct. Ct. R. 486; 7 John. R. 394; 9 ib. 312.

But, a mere declaration, by the testator that he had devised *all* his lands and did not wish to alter his will, except to add another executor, is not such a re-publication as will pass after-acquired land; and if a testator alter his will, so as to embrace after-acquired land, but the memorandum altering the will be attested by only *two* witnesses, the alteration will be void, and the after-acquired lands will not pass. 9 John. 312.

§ 5. The power of testamentary disposition, extends to all interest in real or personal estate, which, at the decease of the testator, would, if not so disposed of, devolve on his general real or personal representatives. Perk. Jarm. wills, 38.*

A right of entry may be devised. 7 Cowen, 238. So, land adversely held by another.—*Ib.* Otherwise, if by a disseizor—but adverse possession does not amount to disseizin.—2 Wend. 166. Disseizin must *commence* by wrong. 5 Cowen, 371; 2 Wend. 166. A testator cannot devise land of which he was disseized at the time of his death, or had no legal or equitable title to, at the date of the will. 3 John. Ch. C. 307, 312. Seizin must exist at the time of the testator's death. 5 ib. 441.

In Massachusetts, by statute, lands of which testator was disseized may pass by will;—it was otherwise before the statute.—10 Mass. 131; 15 ib. 115. So in Pennsylvania. 4 S. & R. 435.

*By this rule, a joint tenant, in England, could not devise his interest, because there his interest would survive to his co-tenant. But in Mississippi, and other States, where the *jus accrescendi* is abolished, such interest may be devised.

In Mississippi, only such lands descend as the owner died seized and possessed of. Query—are such lands descendible? In Connecticut, the maxim, “seizina facit stipitem,” has never been adopted, but on the death of the ancestor the descent is cast on the heir, without any reference to the actual seizin of the ancestor. 3 Day, 166.

That lands adversely held, may be devised, see 3 Marsh. 508, 509; 3 Bibb, 4; 6 Monroe, 17; 525; 3 J. J. Marsh. 214. So in N. Hampshire—6 N. H. Rep. 47. So in New-York—2 Wend. 166; 7 Cowen, 238. So in Virginia—2 Leigh, 664; 1 Wash. 75; 2 Munf. 200; 6 Binn. 416; 1 Peters, S. C. 571. See also 4 Har. & McHen. (Md.) 238.

§ 6. The settled rule of a devisable interest in some parts of the United States is, that it must be such an interest in land, as is descendible. 4 Kent, (5th ed.) 512, 513; 7 Cowen, 238; 5 N. Hamp. 181; 6 ib. 47.

All contingent possible estates are devisable, for there is an interest. 4 Kent, (5th ed.) 510. A will may operate on a contingent reversionary interest. 10 Pick. 306, 309; 5 ib. 528; 21 ib. 215; 4 Bro. S. C. 337–8; 1 Metcalf, 281; 6 Dana, 60—But not a possibility of reverter—2 Hill’s Ch. (S. C.) 248—A power to sell lands may be devised. 1 Hoff. 204.

§ 7. An equitable interest founded on an agreement is devisable. 3 John. Ch. 312; 1 Wend. 325; 4 Ohio, 115. A subsequently acquired legal estate will descend to the heir as trustee of the devisee of the equitable interest. Perk. Jarm. wills, 43. So, *e converso*. Ibid.

But in order to entitle the devisee, the agreement to purchase must be made before the execution of the will. 3 John. Ch. 307; 2 Story Eq. 790; 1 Sugden on Vend. (6 Am. ed.) 204.

But on failure of such devise, the devisee is not entitled to receive its value out of other parts of the estate. 2 Wend. 166; Wms. Ex’rs. (2d Am. ed.) 1251, 1253.

§ 8. A devise of a slave and her increase, passes a child born, after the devise was written. 2 Bibb. 67.

The testator’s will directed, “*after the death* of his wife, his negro girl Fan to be sold, and her proceeds divided among her

five eldest children; but if his son William choose he may keep Fan, by paying to each of the said children \$100;" and further directed "the residue of his estate to be divided among his five younger children." Fan had one child after the execution of the will and before testator's death, and five after his death, and before the death of the tenant for life—*held*, that the increase of Fan, *before* the testator's death, fell into the residuum;—that a specific vested legacy in Fan, to take effect on the death of the testator's wife was not given either to William, or, on his refusal to take her at the price fixed, to the elder children; but that this was a mere direction to divide the proceeds of Fan's sale among the elder children, with the privilege to William to keep her at a fixed price; and consequently, that the increase after the testator's death, did not belong either to William, if he had elected to take her, or to the elder children, but fell into the residuum and was subject to division among the younger children. 2 Hill's Ch. R. 50.

CHAPTER XVII.

CONSTRUCTION OF WILLS.

§ 1. As a general rule, wherever a testator refers to an actually existing state of things, his language is referential to the date of the will, and not to that of his death, as this is then a prospective event. Perk. Jarm. wills, 278—citing Amb. 397; 8 Vin. abr. 328; 2 Atk. 593; 1 P. W. 597. Events which have happened since the publication of the will, are unavailable to introduce an intention into it. Nevertheless, it is legal to anticipate in a will many events which may happen, and to provide for them. Ram. wills, ch. 14, cited in 3 Lomax, 119.

§ 2. The exposition of wills has always been governed by the *intention* of the testator. This rule was part of the Common law. 6 Mod. 110; 1 Salk, 237; 1 P. Wms. 20.

Since the statute of wills, the same rule has invariably prevailed. The intention of the testator, is the *pole-star* for the construction and direction of devises. 2 Burr. 1112; 1 Atk. 377; 2 East. 42; Swinb. on wills; 1 Root's Conn. repts. 332; 11 ib. 144; 4 Rand. 213, 181; 6 Dana, 124.

And effect must be given to a will, as far as that intent can be ascertained; and judges cannot control that intent, by their own idea of its fitness or unfitness, or of the liberality or political tendency of it. 4 Ves. 312, 341, 329, 574; 2 Vern. 327. For where capacity of testator, formal execution, and volition, *all* appear, no tribunal can pronounce against a will, because of its disapprobation however strong, of the dispositions made by the testator. 1 Iredell, 209. And if the Court is satisfied of the testator's intention, when he made the will, it must prevail, however different the circumstances of his family may have become afterwards.—10 Yerg. 444—(But see *ante* pages 75 & 76.)

§ 3. Such intention must prevail, and the first object is to gather such intention from the *whole* will, and carry it into effect, if *legal* and *not* in opposition to public policy, or any known rule of law. 4 Rand. 213; 1 Gall. C. C. R. 454; 6 Peters, 68.

But every will must be legal, and not repugnant to any fundamental or positive rule of law, nor against a settled rule of interpretation. 2 Har. & Gill. 127; 2 Har. & John. 356; 3 Call. 299; 6 Peters, 68. See title "void devises," *post*.

§ 4. The words of the will, *free from conjecture*, are the proper source from which to collect the testator's intention, both at law and in equity. 12 Ves. 295; 2 Atk. 373; 1 Eden. 39, 94; 5 Coke, 686; 2 Vern. 625; 2 M. & S. 455, 458; 2 Humph. 50; 6 Peters, 68. It need not however be express, but may be inferred even in opposition to the ordinary meaning of words. As where testator devised to his children his real estate, and also a sum of money to one of them, so that his real and personal estate be both brought into the estimate and divided in such manner as to make their portions equal;—the sum of money bequeathed shall be brought into the estimate, though the term "specifically given"

and "estimate" do not apply strictly to money—it being plain that the intention of the testator as inferrible from the will, was to make all his children equal. 4 Rand. 181; 6 Dana, 124, 129.

§ 5. But as a will must be in writing, the intention of the testator must be derived from the writing itself—3 Burr. 1541; 1 Eden. 43—and words *varying* the construction of the will cannot be supplied. 5 T. R. 323; 6 Munf. 114. So no words, having any possible meaning to them, must be rejected. 1 Wash. 53.—But where words are impossible in the place where they occur, or their ordinary meaning is deserted and no other furnished by the will, they must be disregarded, as surplusage. 9 Wheat. 565.

The language of wills is not of universal interpretation, the same in all countries and under all circumstances; but are supposed to speak the intent of the testator according to the known laws and usages of the country where he is domiciled, by an implied reference to them. Hence his domicile should be known, and whether he referred to its laws or not. 9 Peters, 483.

§ 6. The cardinal rule of interpretation is to take the *whole will* together, without regard to any thing technical, or any particular form of words. 1 Munf. 537; 1 Dana, 82; 2 Humph. 50. Courts of justice cannot make a will for a testator, by arbitrary rules of construction. 2 Call, 87; 1 Munf. 549; 4 Rand. 213, 181; 2 Burr. 770; 11 Mass. 528.

But in ascertaining that intention, the construction which has been put on like words, and the artificial rules by which it is fixed in the authorities, are to be inflexible guides, where they distinctly and pointedly apply—1 Mason, Ct. Ct. R. 234; 5 Mass. 500—and the *technical* effect of words in a will, is presumed to be meant, *unless a contrary intention* appear. 1 Bos. & P. 57; 2 P. Wms. 741; Doug. 341; 5 M. & S. 95; Ram. wills, ch. 15.

And Courts must construe wills on known principles and established rules, and not on loose conjectures, or by considering what a man may be imagined to do, in the testator's circumstances. 1 Eden. 43. Settled rules of interpretation must prevail. 2 Harr. & Gill.; 2 Har. & John. 356; 3 Call. 299. And adjudged cases may be argued from, if they establish general rules of construction to find out the testator's intention. 1 Burr. 233; 4 Kent's Com. 539, 540. For if Courts were allowed an unlimited latitude

of conjecture, there would be endless litigation. Harg. Tr. 295; 1 Mason, 224. See also 3 Lomax, 120.

§ 7. The *grammatical* construction must prevail, where an intent to the contrary does not plainly appear. 1 Iredell, 166.—Courts will supply words omitted by mistake, or absolutely necessary to effectuate the general intention of the testator. 2 Burr. 767; 3 Atk. 315; 7 T. R. 433; 6 East. 485; 3 Lomax, 122. But where a will is plain, the Court will not, in order to enlarge devises, transpose words from other clauses obviously relating to other subjects. 2 Munf. 453. But general words in one part of a will, may be limited and restrained by subsequent words; and where there is a manifest general intent, the particular intent must yield to it. Ram. wills, ch. 14; 3 Lomax, 119. So, the secondary intent to the primary—9 Peters, 68; 4 Dev. 381. As where a clause of the will directed the slaves of the testator to be emancipated, and charged real and personal estate with the expense of emancipating them, and by a subsequent clause devised all the real estate and the balance of his personal estate to certain devisees;—it was *held* that the devisees should take the real estate, subject to the charge. 4 Humph. (Tenn.) R. 208.

§ 8. It is immaterial in what portion of the will the testator's intention is to be found. Courts will bring different clauses in aid of each other—enlarging the sense of some, and restraining that of others—and combine different devises, giving a uniform construction to the whole will—let each particular devise if possible have its intended effect—and thus supply the defect of counsel in the last extremity of life. 1 Gall. Ct. Ct. R. 454; 3 Bur. 1662, 1625; For. 160; 1 B. & And. 137; 6 Peters. 68.

In ascertaining the intention of the testator, the Court will ascertain—

1st. The terms of the particular bequests, considered relatively to each other, conformably to their obvious meaning, and the established rules of law:

2d. All other parts of the same will:

3d. The situation and circumstances of the testator, and the subject matter of the bequest—2 Dall. R. 244; 2 Binn. 150, 377; 4 Rand. 213; 2 Dana, 48, 82; 4 ib. 549; 1 No. Car. rep. 446, 450; Bald. Ct. Ct. R. 459—but only circumstances existing at the date

of the will—10 Yerg. 444—and all inquiry must go to show the intention at the date of the will. 2 M'Cord's Ch. R. 307; 5 B. & C. 69.

§ 9. A will shall be so construed that it shall rather stand than fall, if such construction can be reasonably put on it. 6 Dana, 53. Yet if the testator declares his intention to be, to dispose of all his estate, and it does not appear with sufficient certainty who are devisees of particular portions, he shall be considered intestate as to them. 6 Dana, 313. And if a will be obscure as in 5 Coke, 68—where it did not appear to which of the devisees the condition was intended to apply—or as in 3 Atk. 257; and 1 ib. 411; 2 ib. 372; 11 East. 441; and 2 Vern. 621—or if it be unintelligible, as in 2 Atk. 239, and 3 Bro. Ch. C. 311—where the name of the devisee was not inserted—or if the words, from any cause, utterly fail to disclose any intention, collateral evidence is inadmissible to discover an intention. 4 M. & S. 556.

§ 10. Introductory words often assist in showing the intention of a testator. 3 Lomax, 120.

Wherever they aid in showing the intent of the testator, the Courts have laid hold of them, as they will of *every other circumstance in a will*, which may help to guide their judgment to the true and right construction of it. Cowp. 306. In the same case, lord Mansfield said—"introductory words *cannot vary* the construction of a devise so as to enlarge the estate of a devisee, *unless* there be words *in the devise* itself sufficient to carry the degree of interest contended for;"—and in Cowp. 356, it is laid down "that introductory words, declaring the testator's intention to dispose of *all* his real estate, is a *strong circumstance*, connected with other words to enlarge a particular estate, or pass a fee, *if there be no words of limitation*, but it will *not do alone*." So, Forest. 157; 1 Wilson, 133; 3 ib. 143; Cowp. 299—show *other* words, besides the preamble, clearly manifesting the intention of the testator. See Cowp. 352; Doug. 732; 11 East. 220; Cowp. 661, 657; 3 Burr. 1618, 1625; 5 T. R. 13; 8 ib. 497, 64; 5 East. 51; 15 ib. 505; 11 ib. 223. See also, 1 Munf. 549; 3 ib. 75; 3 Call. 265, 280, 307; 1 Wash. 96; 1 Call. 110, 127; 3 Rand. 280; 2 Munf. 263; 10 Wheat. 204; 14 S. & R. 84; 4 Har. & John. 209; 1 Gall. 454; accordant. Introductory words will not *per se*, enlarge an

estate into a fee where the words could not ordinarily import it. 10 Wheat. 204—As, the word “tenement.” 9 Wheat. 565. Nor a declaration by preamble that the testator wishes to dispose of all his estate. 1 Gallis. 454—or the words “temporal goods”—3 Rand. 280. If by all the words of the will, it appear affirmatively that the testator intended to devise a fee, a fee will pass. 12 Pick. 27; 18 ib. 537, 539.

§ 11. The *context* of a will is a further means of ascertaining the intention of the testator. Dyer, 333; 9 Coke, 128; Cro. J. 415; 3 Mod. 123; 1 Vent. 230.

It may convert an estate for life into an estate tail. 1 P. Wms. 605; 3 T. R. 448, note (a)—1 Vent. 231; 1 Atk. 432; 1 Burr. 268; 5 T. R. 335; 2 Ves. 611.

Or it may explain a limitation in fee, to be a fee tail—4 T. R. 605—as, by limitation over on the failure of the *heirs of the body* of the first devisee. Cowp. 410; 7 T. R. 276; 8 ib. 211; 6 East. 336; 9 ib. 382; 12 ib. 253; 4 M. & S. 61; 3 Mod. 123; 1 P. Wms. 23; 2 Eq. C. ab. 205; 1 Eden. 142; Amb. 363; 3 T. R. 488, note (a)—6 T. 485.

Or, it may explain a limitation in fee into an *executory devise*. 3 T. R. 146; 10 Mod. 419; 3 Bro. Ch. C. 147. For examples of executory devises limited on the contingency of the devisees dying in his minority, see Palm. 136; 1 Wils. 105; 3 Atk. 198; 3 ib. 390. For such as are limited on contingency of devisee's death, without leaving issue at the time of his death, see Eq. C. ab. 306, pl. 7; 3 T. 43; 7 T. T. 589; 2 Bos. & P. 324; 1 B. & A. 713; 3 ib. 546. (See also Statute of Mississippi.)

Or, it may explain an estate for life, into a fee. See next section.

§ 12. As to the *quantity* of the estate devised, the *intention* of the testator, if sufficiently declared, must be carried into effect, however defective the language may be. 3 Lomax, 177.

Even according to the doctrines of the English law, the word “heirs,” need not be used in a will to pass a *fee*; but any words, which sufficiently show the intention of the devisor to give the whole interest, will have the same effect. 1 P. Wms. 77. But such intention must be plain and not conjectural, and necessary to give effect to the words of the will—10 Wheat. 204; 2 Prest.

Esta. 69—Otherwise, the general rule will prevail, which is, that where there is a devise, without words of limitation, the devisee will only take an estate for life. 1 Gall. 454; 3 Cranch. 97; 3 Wash. C. C. R. 369; 4 ib. 194; 9 Wheat. 565.

And the rule is the same, notwithstanding the testator may have commenced his will with a declaration of his intention to dispose of his whole estate—Cowp. 657; Doug. 731; 8 Durn. & E. 64; ib. 497; 1 Gall. 454—*unless* coupled with other expressions confirming such intention, as, “I devise to A freely to possess and enjoy.” 3 Wash. C. C. R. 369.

And although the testator may have given a nominal legacy to his heir—2 Bl. 1045; Doug. 730; 3 Mau. & Sel. 518—or, may have declared an intention wholly to disinherit him—or the will may contain an antecedent devise to the heir for life of the testator’s property which is the subject of dispute—1 B. C. C. 519; 9 East. 267—or, the devise may be to a *class*, as testator’s children embracing the heir—Cro. El. 330—or, though, in another part of the will, or the immediate context, there be a devise expressly for life, affording the argument that the testator meant something more, or at least different, by the indefinite devise—7 Durn. & E. 633; 1 B. C. C. 519; 2 New. Rep. 343; 5 Adolph. & Ell. 317—though any, or all of these circumstances concur in the same will, it is indisputable that such a devise will confer only an estate for life—2 Perk. Jarm. wills, 171—and if there be a devise to one generally of *freehold* and *personal* estates without any words of limitation, he will take only an estate for life in the freehold, but the personal property absolutely—1 Harr. & Gill. 111; 8 Mass. 3; 4 Monroe, 257; 1 Scam. 276; 9 John. 222; 14 ib. 198; 10 ib. 148—unless, in respect to the freehold there be a manifest intention to give a fee—24 Pick. 129, 133; 11 Mass. 528, 531; 4 Kent. (5th ed.) 5, 6, 7; 8 John. 141; 9 ib. 222; 14 ib. 198; 17 ib. 221; 6 Binn. 94; 14 Serg. & R. 84; 10 Wheat. 204; 6 Harr. & John. 209, 210—But if such intention be manifest, a fee simple will pass without words of limitation or perpetuity.—1 Munf. 549; 3 Desaus. 249; 3 ib. 168–80; 5 Call. 463; 2 Desaus. 290; 21 Maine, 340; 18 Pick. 539; 12 Wend. 602; 12 Pick. 27; 4 Kent. (5th ed.) 5, 6, 7; ib. 536, et seq.; 6 Harr. & John. 205; 1 McMul. 346; 10 Mass. 303; State Eq. R. 72; 2 M’Cord, 171.

§ 13. If an estate be given generally, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexed to it a power of disposition of the reversion. 4 Kent, (5th ed.) 535, 536; 2 John. 391; 12 ib. 389; 16 ib. 587, 588; 1 Serg. & R. 16; 8 Cowen, 277.

§ 14. A fee will also pass where the purposes of the devise cannot certainly be accomplished, unless the devise be construed to pass a fee—3 Lomax, 178; 2 Prest. Est. 72, 207—As, where the devisee is directed to pay the testator's debts; for in such case, if the devisee only took an estate for life he might be damaged—2 Perk. Jarm. wills, 171; Willes, 440; 8 Durnf. & East. 1; 4 East. 496—and neither the improbability of such loss, arising out of the relative amount of the debt and value of the property devised, nor the contingent nature of the charge will alter this rule.* *Ibid.*—and see 2 Atk. 341; 8 Durnf. & East. 497; 3 Russ. 350; 3 Barn. & Adolph. 753. And it is immaterial whether the devisee is directed to pay simply or to pay out of the land.—5 East. 87.† So, though the devisee be appointed executor. 6 Madd. 9; 3 Barn. & Adolph. 753.

§ 15. But the foregoing rule is confined to indefinite devises; it does not apply where an estate for life is expressly given, or an estate tail express or implied; nor where the devise is *after* payment of debts, or subject to same, (without saying by whom the charge shall be borne.) 5 Durnf. & East. 558; 1 Bos. & Pull. 247; Prec. ch. 67—see also note † *infra*.

§ 16. A fee will also pass, where the devise is succeeded by a gift over, in the event of the devisee dying in his minority; for the necessary presumption is, that by limiting the second gift to the contingency of the first devisee's death in his minority, the donor intended the *first* to take the *fee* on arriving at full age—9 East. 600; 2 Mau. & Selw. 608; 6 Price, 179—overruling 1 Com. 358. The rule is the same though the prior devise be to the

*A contingent charge on an estate devised will not carry the fee. 8 John. 141.

† When the charge is on the *estate*, without words of limitation, the devisee will take only a life estate; but if on the person of the devisee in respect to the estate devised, he takes a fee. 10 John. 148; 18 ib. 31; 6 ib. 185; 18 Wend. 200; 7 Paige, 421; 15 Maine, 436; 5 Harr. & John. 177; 6 ib. 208; 9 Mass. 161; 10 Wheat. 231; 3 Mason, 309, 312; 11 Mass. 528; 4 Pick, 198, 203; 24 ib. 129; 2 M'Cord's Ch. 177; 1 Cramp. & Mees. 39.

children of a devisee for life—9 East. 600—and though another contingency be coupled with that of death under a prescribed age. 10 East. 460; Willes, 138; 1 Kee. 240.

But the doctrine cannot apply in any case where the second devise rests on any contingency not coupled with the death of the first devisee, but on a distinct collateral event. Cowp. 235.

And where a devise without words of limitation, is to be substituted for another and previous devise in fee, it cannot be enlarged by this rule into a fee. Skin. 339; ib. 285; Pre. Ch. Ch. 67; 2 Wils. 80.*

As to the devise of lands in trust, and the application of this rule thereto, see 1 Kee. 240; 9 Mod. 92; 2 P. Wms. 194; 2 Eq. Ca. abr. 329; Cruise, C. Dig. 641; 3 Atk. 316; 2 Perk. Jarm. wills, 178.

§ 17. A devise of wild lands will pass a fee, without words of inheritance; and the devisee may shew the fact that the lands are wild by parol evidence. 3 Lomax, 194; 10 Mass. R. 307; ib. 305; 1 Yeates, 250, 380.

§ 18. No technical words are necessary to devise a fee. 12 John. 389. "I devise my lands," are words sufficient to pass a fee. 8 Ohio, 365. So, the words "I will and bequeath to my son R. one half of my plantation, whereon I now live." 2 McCord's Ch. 177. A devise "of all one's right" carries a fee. 2 Caine, 345.

A devise will pass a fee, if the will uses the words, "to A. in fee simple"—And. 51;—or, "to A. forever"—Co. Litt. 96; 8 Vin. ab. 206; 1 Bulst. 219; 2 Ld. Raymond, 1152; 1 B. C. C. 148—(but *not* if to a person and his assigns, simply—C. Litt. 96)—or even "to him and his," simply—South. 36—or "to A. to give and sell;" 8 Vin. ab. 206—or "to A. to give away at his death to whom he pleases;"—or, "to be at the discretion of a person." See 2 Perk. Jarm. wills, 180.

It has been disputed whether a devise of lands to a person "by him freely to be possessed and enjoyed," will pass a fee. 2 Perk. Jarm. wills, 179, and other authorities there cited. In the

*Where lands are devised in fee with a limitation over, to which no words of inheritance are annexed, the ulterior devise will, notwithstanding, be a fee. 11 John. 337.

United States, it has been decided that these words are sufficient, when coupled with the declaration of a general intention of the testator to dispose of *all* his estate. 3 Wash. Ct. Ct. R. 369. See also 9 Wheat. 565; 10 ib. 204; 4 Wash. Ct. Ct. R. 194.

§ 19. The word "estate" passes a fee, because it embraces not only the *corpus* of the property, but also the testator's interest in it. 2 Perk. Jarm. wills, 181; 6 John. 185; 13 ib. 537; 12 ib. 389; 11 ib. 365; 21 Maine, 340; 18 Pick. 539; 4 Day, 368; 17 Mass. 68; 2 Desaus. 573, 422; 1 Bro. C. C. 437, notes; 2 ib. 539; 9 Sim. 447; 3 Yeates, 187; 6 Binn. 97; 3 Desaus. 80; 4 Kent, (5th ed.) 535. The word "property" is also sufficient; so, "residue of testator's *real* effects." 16 East. 221; 18 Ves. 194; 1 Jac. & Walk. 189—(See also, 2 Perk. Jarm. wills, 178 to 190, and appendix to this work.)

§ 20. In many of the States, the subtilties and embarrassments growing out of the preceding rules, in relation to the interest conveyed by an indefinite devise, have been swept away by statutory enactments.

In Mississippi, the statute provides, that "*every* estate in lands, which shall hereafter be granted, conveyed, or devised to any person or persons—although other words, *heretofore* necessary to transfer an estate of inheritance be *not* added—shall be deemed a fee-simple, if a less estate be not limited by *express* words, or do not appear to have been granted, conveyed or devised by construction or operation of law. How. & H. sec. 23, p. 348.

In Virginia, Kentucky, Missouri, Alabama and New-York, the word "heirs," or other words of inheritance, are no longer necessary to create or convey an estate in fee; and every grant or devise of real estate, subsequent to the statute, passes all the interest of the grantor or testator, unless the intent to pass a less estate or interest, appears in express terms, or by necessary implication. 4 Kent, (5th ed.) 7, 8—8 Paige, 325.

In New-Jersey, Maryland, North-Carolina, South-Carolina and Tennessee, it has been declared by statute that a devise of land shall convey a *fee simple*, unless it appear, by express words, or manifest intent, that a less estate was intended. 4 Kent, (5 ed.) 8, 537, 538, and notes—1 Harr. & Gill. 138, note.

And now in England, by act of 1 Vict. ch. 26, it is enacted,

“that where any real estate shall be devised to any person, without any words of limitation, such devise shall be construed to pass the fee simple, or other the *whole* estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will. 2 Perk. Jarm. wills, 193.

§ 21. The effect of these enactments is merely to reverse the rule. Under the old law, an indefinite devise without words of limitation passed only a life estate. Now, the same devise will confer a fee, unless a contrary intent be manifest. The burden of proof is, in such case, shifted upon those claiming the more restricted interpretation; and as the restricted construction rarely accords with the actual intention of the testator, it will probably not often occur, that the Courts will be called on to apply the *proviso*, which saves the effect of a restrictive context; so that there seems no reason that the newly enacted rule will be so prolific of qualifications and exceptions as that doctrine which it has superseded. 2 Perk. Jarm. wills, 194.

RULES OF CONSTRUCTION.

§ 22. In connection with what has been said, respecting the *construction* of wills, will now be presented to the reader a summary of the several rules of construction, as compiled in the admirable treatise of Perk. Jarm. on Wills, vol. 2, p. 740.

I. A will of *real* estate, wheresoever made, and in whatever language written, is construed according to the law of England (or other State,) in which the property is situate. Pre. Ch. 577. But a will of personalty is governed by the *lex domicilii*. (1 Jarm. wills, 2.)

II. Technical words are not necessary to give effect to any species of disposition in a will. 3 Durn. & E. 86; 11 East. 246; 16 id. 222.

III. The construction of a will is the same at law and in equity—3 P. W. 259; 2 Ves. 74—the jurisdiction of each being governed by the nature of the subject. 1 Ves. 16; 2 ib. 417; 4 Ves. 329. Though the consequences may differ, as in the instance of a contingent remainder, which is destructible in the one case and not in the other.

IV. A will *speaks*, for some purpose, from the period of execution, and for others from the death of the testator; but never *operates* till the latter period. 1 Perk. Jarm. wills, 277, & *ante*.

V. The heir is not to be disinherited without an express devise, or necessary implication. Br. Devise, 52; Dyer, 330; 2 Strange, 969; Hardw. 142; 1 Wils. 105; Willes, 303; 2 D. & E. 209; 2 Mau. & S. 448. Such implication importing not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed. 1 Ves. & B. 466; 5 Durn. & E. 558; 7 East. 97; 1 New. Rep. 118; 18 Ves. 40.

VI. Merely negative words are not sufficient to exclude the title of the heir, or next of kin. There must be an actual gift to some other definite object. 4 Beav. 318; 1 Perk. Jarm. wills, 294, *ante*.

VII. All parts of a will are to be construed in relation to each other, and so as, if possible, to form *one consistent whole*. But, where several parts are absolutely irreconcilable, the latter must prevail. 9 Mod. 154; 2 Bl. 979; 1 Durn. & E. 630; 6 Ves. 100; 16 Ves. 314; 3 Mau. & S. 158; Swanst. 28; 2 Atk. 372; 6 Durn. & E. 314; 2 Taunt. 109; 18 Ves. 421; 6 Moore, 214; 1 Perk. Jarm. wills, 411, note, and *ante*.

VIII. *Extrinsic* evidence is *not* admissible to alter, detract from, or add to, the terms of a will—16 Ves. 486; 5 Rep. 68; 7 Durn. & E. 138—though, it may be used to rebut a resulting trust, attaching to a legal title, created by it. 1 Perk. Jarm. wills. 357; & *ante*.—or, to remove a latent ambiguity. *Ibid.*—and see *post*. evidence.

IX. Nor, to vary the meaning of words—4 Taunt. 176; 4 Dow. 65; 3 Mau. & S. 171—But see 2 P. W. 135—And therefore, in order to attach a strained and extraordinary sense to a particular word, an instrument executed by the testator, in which the same word occurs in that sense, is not admissible. 11 East. 441.—But,

X. The Courts will look at the circumstances under which the deviser makes his will; as, the state of his property—I Mer. 646; 7 Taunt. 105; 1 Barn. & Ald. 550; 3 Barn. & Cress. 870; 1 B. C. C. 472—of his family—4 Burr. 2165; 4 B. C. C. 441; 3 Barn. & Ald. 657; 3 Dow. 72; 3 Barn. & Ald. 632; 2 Moore, 302—and the like—I Black, 60; 1 Mer. 384. .

XI. In general, implication, is admissible only in the absence of, and not to control an express disposition. 8 Rep. 94; 2 Vern. 60; 1 P. W. 54.

XII. An express and positive devise, cannot be controlled by the reason assigned—16 Ves. 36—or by subsequent ambiguous words—8 Bligh. N.S. 88—or by inference and argument from *other* parts of the will—1 Ves. Jr. 268; 8 Ves. 42; Cowp. 99.—And accordingly, such a devise is not affected by a subsequent inaccurate recital of, or reference to its contents—Moore, 13, pl. 50; 1 And. 8, Cowp. 83—though recourse may be had to such reference, to assist the construction, in case of ambiguity or doubt.

XIII. The inconvenience or absurdity of a devise, is no ground for varying the construction, where the terms of it are unambiguous. 1 Mer. 417; 2 Sim. & Stew. 295.

Nor, is the fact that the testator did not see all the consequences of his disposition, a reason for varying it. 3 Mau. & S. 37; 1 Mer. 358. But where the intention is obscured by conflicting intentions, it is to be sought rather in a rational and consistent, than an irrational and inconsistent purpose. 4 Madd. 67; 3 B. C. C. 401.

XIV. The rules of construction cannot be strained to bring a devise within the rules of law—I. Cox, 324; 2 Mer, 389; 1 Jac. & Walk. 31. But see 2 Russ. & M. 306; 2 Kee. 756; 2 Beav. 352.

But, it seems, that where the will admits of two constructions, that is to be preferred, which will render it valid. And therefore, the Court in one instance adhered to the literal language of the testator, though it was highly probable, that he had written a word, by mistake, for one which would have rendered the devise void. 3 Burr. 1626; 3 B. P. C. Tomlin Ed. 209.

XV. Favor, or disfavor, to the object, ought not to influence the construction. 4 Ves. 574. But see 2 Ves. & Be. 269.

XVI. Words, in general, are to be taken in their ordinary and grammatical sense, unless, a clear intention to use them in another, can be collected,—and, that other can be ascertained. 18 Ves. 466. And they are, in all cases, to receive a construction, which will give every expression some effect, rather than one

which will render the expression inoperative. 3 Ves. 450; 7 ib. 455; 7 East. 272; 2 Barn. & Ald. 441. And, of two modes of construction, that is to be preferred which will prevent total intestacy. Cas. Temp. Talb. 161; 3 Ves. 204; 2 Mer. 386.

XVII. Where a testator uses technical words, he is presumed to employ them in their legal sense. Doug. 340; 6 Durn. & E. 352; 4 Ves. 329; 5 Ves. 401.

XVIII. Words, occurring more than once, in a will, shall be presumed to be used, always, in the same sense—2 Ch. C. 169—unless, a contrary intention appear by the context—Doug. 269—Or, unless the words be applied to a different subject. 1 P. Wm. 663; 2 Ves. Sen'r. 616; 5 Mau. & S. 126; 1 Ves. & Be. 260. But see 14 Ves. 488. And on the same principle, where a testator uses an additional word or phrase, he must be presumed to have an additional meaning, 4 B. C. C. 15; 13 Ves. 39; 7 Taunt. 85. But see Ambler, 22; 6 Ves. 300; 10 Ves. 166; 13 East. 559; 13 Ves. 476; 19 Ves. 545; 1 Mer. 120; 3 Mer. 316—where the argument that the testator, notwithstanding some variation of expression, had the same intention, in several instances, prevailed.

XIX. Words and limitations may be *transposed*—2 Ch. C. 10; Hob. 75; 2 Ves. 34; Amb. 374; 8 East. 149; 15 East. 309; 1 Be. & A. 137;—but see 2 Ves. sen'r. 248;—or *supplied*—7 Durn. & E. 437; 6 East. 486; 3 Dowl. & Ry. 398; 2 Bl. 1014;—or *rejected*,—2 Ves. 276; 3 Durn. & E. 87, n.; 3 ib. 484; 4 Ves. 51; 5 Ves. 243; 6 Ves. 129; 12 East. 515; 9 Ves. 566—where warranted by the immediate context, or the general scheme of the will; but not merely on a conjectural hypothesis of the testator's intention, however reasonable, in opposition to the plain and obvious sense of the language of the instrument. 18 Ves. 368; 19 id. 652; 2 Mer. 25.

XX. Words, which, it is obvious, are mis-written, (as dying *with* issue, for dying *without* issue,) may be corrected. 8 Mod. 59; 5 Barn & Adolph. 621; 3 Adol. & Ellis, 340.

XXI. The construction is not to be varied by events subsequent to the execution. 3 P. W. 259; 11 East. 558, n.; 1 Cox, 324; 1 Ves. 475. But the Court, in determining the meaning of particular expressions, will look to possible circumstances, in which they *might* have been called on to affix a signification to them. 11 Ves. 457.

XXII. Several independent devises, not grammatically connected, or united by the expression of a common purpose, must be construed separately and without relation to each other; although, it may be conjectured, from similarity of relationship, or other such circumstances, that the testator had the same intention in regard to both. Doug. 759; 8 Durn. & E. 64; 1 N. R. 335; 9 East. 267; 11 id. 220; 14 Ves. 304; 4 Mau. & S. 58; 1 Pri. 353; 4 Barn. & Cress. 667. There must be an apparent design to connect them. 10 East. 503. This, and the former class of cases chiefly relate to a question of frequent occurrence—(i. e.) whether words of limitation, preceded by several devises, relate to more than one of those devises?

XXIII. Where a testator's intention cannot operate to its full extent, it shall take effect as far as possible. Finch. 139; 3 P. W. 250; 4 Ves. 325; 13 Ves. 486.

XXIV. A testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary. And accordingly, a provision for the death of devisees, will not be considered as intended to provide exclusively for lapse, if it admits of any other construction. 2 Atk. 375; 4 Ves. 418, 554; 1 Ves. & Be. 422; 1 Pri. 264; 1 Swanst. 161; 2 Ves. 501; 1 McLeland, 168; 2 Irish Eq. 161.

CHAPTER XVIII.

ESTATES TAIL.

§ 1. Estates *tail*, unknown to the common law, but growing out of the statute *de bonis conditionalibus*, and upheld by the courts of England in order to provide for the issue of the first taker, have been long abolished in the United States, by statutes which operate a conversion of such estate, into an estate in fee simple in the first taker. And although in consequence of these statutes, *estates tail* are now seldom or never created by will, yet

as one might arise by implication, which would be subject to the operation of the statute, it is necessary to understand the nature of such estate, and the means by which they may be created.

§ 2. In Mississippi, the statute provides, that "in all cases, where a devise expressly or by implication, creates an estate in *fee tail*, the same shall be an estate in fee simple, and shall be discharged of the condition, (by the common law, annexed thereto, restraining alienation before the donee shall have issue,) so that, the donor, or person in whom the conditional fee is vested, or shall vest, shall have the same power over the said estate, as if the same were a pure and absolute fee, *provided*, that any person may make a conveyance or devise of lands to a succession of donees *then living*, and the heir or heirs of the body of the remainder-man—and in default thereof to the right heirs of the donor in fee simple." (H. & H. ch. 34, sec. 24, p. 348.)

In New-York, estates *tail* were abolished in 1782—in New-Jersey, 1820—in Virginia, 1776—N. Carolina, 1784—in Kentucky, 1796. They have also been abolished in Tennessee and Georgia.

In Alabama, (as in Mississippi,) a man may convey or devise land to a succession of donees, then living, and to the heirs of the remainder-man.

In Connecticut, (3 Day, 332—9 Conn. 114,) and in Vermont, Ohio, Illinois, and Missouri, if an estate tail be created, the first donee takes a life estate, and a *fee simple* vests in the heirs or person having the remainder after the life estate of the grantee. So, in New-Jersey. In Indiana, a person may be seized of an *estate-tail* by devise or grant, but he shall be deemed seized in fee after the second generation.

In Connecticut, there may be a special tenancy in tail, as in case of a devise to A. and his issue by a particular wife.

In Rhode-Island, estates tail may be created by deed, but not by will, longer than to children of the devisee, and they may be barred by deed or will.

Estates *tail* exist in Massachusetts.—9 Mass. 167, 170, 173; 15 Pick. 104; 20 Pick. 514; 15 Maine, 408; 5 Mass. 500, 502; 8 Mass. 3; 4 Mass. 189. So in Delaware and Pennsylvania; sub-

ject, nevertheless, in all these States, to be barred by deed and common recovery, and in two of these States by will—and they are chargeable with the debts of the tenant. 4 Dana's abr. 621; 4 Serg. & R. 509.

In Maryland, estates *tail* general, created since statute of 1786, are now understood to be virtually abolished, inasmuch as they descend, can be conveyed, are devisable and chargeable with debts, in the same manner as estates in *fee simple*. It is equally understood that estates *tail special* are not affected by the act of 1786. 1 Harr. & Gill. 111—2 Harr. & John. 314.

§ 3. An *estate tail*, is an estate given to a man and the *heirs of his body*. It will descend, on the death of the first taker, to all his lawful issue, children, grand-children, and more remote descendants, as long as his posterity endures, in a regular order and course of descent from one to another; and, if the first owner die without issue, his estate, if left alone, will then determine.

An *estate tail* may be either *general*, that is, to the heirs of his body generally, and without restriction, in which case the estate will be descendible to every one of his lawful posterity, in due course—Or, it may be *special*, when restrained to *certain* heirs of his body, and is not descendible to *all* of them in general. Thus if an estate be given to a man, and the heirs of his body by his wife Anna—here, none can inherit except the issue of that particular wife.

Estates may also be in *tail male*, or in *tail female*. The former can descend *only* to males, the latter only to females, and their female descendants. 2 Bl. Com. 113, 114.

§ 4. The interest of the donor of these estates was of two kinds—his interest in the rents and services during the continuance of the tenancy, and his chance or possibility of again obtaining the land, on *failure of the heirs* of his tenant. And hence it was provided in *Magna Charta*, that no tenant should alienate any more of his land than so as what remained, might be sufficient to answer the services he owed to his lord. But, during the reign Henry III. a change occurred to the disadvantage of the lord, so that, in whatever form the grant were made, the existence of an expectant heir, enabled the tenant to alienate, not only as against his heir, but also against the lord. And the alienee and his heirs

could hold not only during the existence of the issue, but also after their failure. Co. Litt. 19, a.—2 Just. 333—cited in New Lib. of Law & Eq. vol. 2, No. 1, p. 17. This power of alienation was, however, restrained by the statute, *de donis conditionalibus*, created in the reign of Edward I.—which directed, that “the will of the donor, according to the form in the deed of gift manifestly expressed, should be, from thenceforth, preserved; so that they, to whom the tenement was given, should have no power to aliene it, whereby it should fail to remain unto their own issue, after their death, or to revert unto the donor or his heirs, if issue should fail.” *Ibid.*—citing Stat. of Westminster 2d. Since passing this act, an estate given to a man and the heirs of his body, has been always called an *estate tail*, or more properly an estate in *fee tail*, (*feudum talliatum*.)

The inconvenience of strict entails, created by this statute, for about two hundred years, during which the Commons repeatedly attempted to repeal it, induced the judges, by a quiet decision, once more to introduce the power of alienation. (Taltarum’s case, Year Book, 12 Edw. IV. 19.) The mode of alienation thus introduced, took the name of *common recovery*, (besides which there also existed a mode called *fine*,) and continued in use till 1833, when this cumbrous and expensive proceeding was abolished by a statute, which enabled tenants in tail, by a simple deed, enrolled in Chancery, to dispose of entailed lands in *fee simple*—thus at once defeating the claims of the issue, and of all remainder-men and reversioners. New Lib. of Law & Eq. vol. 2, No. 1, Oct. 1845, p. 20.

§ 5. A limitation “to a man and the heirs of his body,” creates an *estate tail general*.

But, though these are the technical terms of limiting an *estate tail*, yet such an estate may be created, in a will, by less formal language; indeed by any expressions denoting an intention to give the devise, an estate of inheritance, descendible to his, or some of his *lineal*, but not to his *collateral* heirs, which is the characteristic of an *estate tail*, as distinguished from a *fee simple*. 2 Perk. Jarm. wills, 232.

It has been decided, that a devise to one, and his heirs *lawfully* begotten, creates an estate tail. Moore, 637; Co. Litt. 20, 6;

Harg. n. 2—cited 2 Perk. Jarm. 233; also 2 Marsh. 107; S. C. 7 Taunt. 85. The reason appears to be that the testator by using the words "*lawfully begotten*," intended to affix *some* qualification to the description of heir, and therefore must have meant an *estate tail*. 2 Perk. Jarm. 233.

The words "heir of the body," in the singular, operate as words of limitation, and consequently confer an estate tail. *Ibid.*—citing Stig. 249, 273; 1 Bulst. 219; 1 Roll. ab. 896. Nor is the effect varied by prefixing the word "first" or "next" to the word "heir." *Ibid.*—citing 2 Vern. 324; 1 Vent. 230: Rob. Gavelk. 96, & 1 Ves. Sen'r. 337; 1 Atk. 412; 2 Ld. Raym. 1437.

And though a devise to the next heir male, simply following a devise to the ancestor for life, does not confer on the heir an estate by purchase, (the words being construed as words of limitation,) yet if the testator has engrafted words of limitation on the devise to the next heir male, he is considered as indicating an intention to use the word "heir" as a mere *descriptio personæ*. 1 Co. 66, Archer's case. Such a devise would be a contingent remainder. *Ibid.* See also 4 Myl. & Craig. 197, where the same doctrine was held, though the word "next" was not prefixed. See also 1 Vent. 214; Fearne Con. R. p. 148.

A devise to A. and his seed, (Co. Litt. 9, 6) or A. and his issue, creates an estate tail; and a devise to A. and his children, (he having no children at the time,) is equivalent to a devise to him and his issue, and creates an estate tail. 15 Pick. 104, 114. A deed to a husband and his wife, (executed before the statute of Massachusetts took effect,) conveying land to be held by them, during their lives and the life of the survivor, and by the heirs of their bodies, created an estate tail in the grantees. 1 Metcalf, 281.

And, it has been settled, from an early period, that where a person devises lands to a person and his heirs, and then proceeds to devise over the property in terms showing that he used the word "heirs" in the *prior* devise, in the restricted sense of "heirs of the body,"—such devise, of course, conveys only an estate tail. Cro. Jac. 290; Cro. Jac. 695; Skinn. 19; 7 Durn. & E. 276—cited 2 Perk. Jarm. 237.

So, where the devise over, in default of heirs of the first devisee, is to be in the course of descent from him lineal or collateral,

however remote; because, the prior devisee could not in that case, die without heirs;—but it is otherwise, where the devise over is to a stranger. 2 Stra. 849; Amb. 363; 2 P. Wms. 370; 1 ib. 23; Willes, 164; Doug. 266; Cowper, 234, 410, 833; 3 Durn. & E. 491, 488; 2 Marsh. 170; 6 Taunt. 485.

§ 6. The rule in Shelley's case, is, that where an estate of freehold is limited to a person, and the same instrument contains a limitation either mediate or immediate, to his heirs or the heirs of his body, the word "heirs" is a word of limitation—i. e. the ancestor takes the whole estate comprised in this term. Thus, if the limitation be "to the heirs of his body," he takes a *fee tail*,—if "to his heirs general," he takes a *fee simple*. 1 Rep. 93; Moor, 718; 1 Bulstr. 219; Cart. 170; 2 Ld. Ray. 870; 2 Salk. 697; 2 Perk. Jarm. 242. See, for statement of this rule, 7 Metcalf, 172; 4 Pick. 205.

And words, however positive, negating the continuance of the ancestor's estate beyond its express limitation, will not exclude the rule. 1 Burr. 38; 4 ib. 2579; 2 W. Blackst. 698. This rule has been generally adopted in the United States. 4 Kent, (5th ed.) 214; 1 Bay. 453; 1 M'Cord's Ch. R. 60; 3 Battle, 455; 1 Hawks, 163; 3 Iredell, 200; 9 Yerger, 209; 2 Wash. 9; 4 Har. & John. 431; 6 Har. & John. 364; 1 Dall. 47; 3 Binn. 139; 5 Ohio, 465.

§ 7. Having laid down very briefly the law respecting estates tail, it only remains for us to ascertain, with greater certainty, the effect of the American statutes before-mentioned upon estates of this nature. This end will be best effected by presenting the reader with a few prominent decisions of the American Courts, on this subject.

Words which would convey an estate tail in lands, convey a fee simple in personalty. 10 John. 11; 11 Wend. 259; 2 M'Cord's Ch. R. 337. This rule applies to a devise of negroes, &c. Ib. 323. Since the statute converting estates tail into fee simple, executory limitations of lands and chattels are to be construed alike, upon the presumed intention by the testator, that, in each case, the estate should go over on the same event. 4 No. Car. R. 441.

§ 8. Where a devise limits a remainder on a fee tail, it shall not be construed as an executory devise, but as a remainder—and

it will under the act become a *fee simple*. I Call. 165. The statute was intended to operate as *one great* universal recovery, and to dock all estates tail whatever. I Leigh, 418, 404.

Where testator devised all his land and slaves to his wife D. P. during life or widowhood, for her and his son M. P.'s support, and if his wife should be then pregnant and with a *boy*, he should have the same benefit of the property with the son M. P.—and at his wife's death or marriage, both land and slaves should be sold and the proceeds equally divided between the two sons;—if with a *girl*, *she* should share equal benefit of the property with the son M. P., *while* in the mother's hands—but at the death or marriage should have only an equal share of the slaves. And if the son, M. P. should die without lawful issue, then the whole estate to go to M. P.'s brother or sister;—and if he should have neither, then to testator's wife's brothers and sisters. The testator's wife was not pregnant, so that he left only one son, M. P.—*Held*, that if the land in consequence of the direction to sell were to be considered as money, his son took the remainder expectant on his mother's estate for life or widowhood, *in absolute property*, and the ulterior executory limitation was void. But considering it as real, he took an estate tail in the remainder, with a contingent remainder limited on his estate, in the event of the failure of issue. 3 Leigh, 103.

Where testator, owning realty and personalty, partly in his own right and partly in right of his wife, devised "all the profits of his estate, after providing genteel support for his wife and daughter, to be applied to his debts; and after payment of debts his estate to be kept together for the mutual benefit of his wife and daughter, till the daughter attain full age or marry, after which the estate should be divided in the following manner—to his wife, *one half* of the land he lived on, and one half of his estate during her life, and if his wife died without any more issue, the whole of his estate should revert to his daughter; and if his daughter died without issue, the whole of his estate should revert to his wife; and if both died without issue, then that part of the estate which came by his wife should revert to her brothers and sisters that may be then living, and the balance of his estate shall revert to *his* brother T. and his heirs, if any; if none, to be equal-

ly divided between the testator's two half brothers. If his wife marry and have issue, he wished her to have the disposal of the whole of the property that came by her. *Held*—1st. The daughter took the half of the land not devised to the wife. 2d. The daughter took an implied *estate tail* in the moiety devised to her, and the wife a similar estate in the moiety of the land expressly devised to her for life, *each* of which *estates tail* was converted into a *fee simple*, by force of the statute. 3d. The statute barred the remainders which were executory devises.* *Ibid.* See also 1 Rand. 194; 1 Wash. 381.

Where a testator devised to his son W. part of his plantation, and if he should chance to die *without* heir or issue,† the above said land must fall into the possession of his brother R. He then bequeathed the remainder of the plantation, providing in the same manner, that if he should die without heir or issue, the plantation should go to W., “by them freely to be possessed and enjoyed. *Held*—W. took an estate tail. 3 Wash. C. C. R. 369; 2 Binn. 455. Our statute would in such case, change the estate to one of in *fee simple*. See also 2 Y. 400; 3 S. & R. 470; 4 S. & R. 509; 1 S. & R. 203; 17 S. & R. 441; 4 Wash. C. C. R. 16; 3 R. 489; *ib.* 59; 16 S. & R. 323; 17 S. & R. 61; 1 Wh. 139; 9 W. 450; 6 *ib.* 18—for examples of estates tail, in Pennsylvania.

Where a devise was to B. and his male heirs, and if no male heirs then to his daughters, and if B. died without issue then to the daughters of A. *Held*—B. took an estate tail—3 Day. 332—Under our statute, a *fee simple*.

Where a devise was to A., and if he die, without any lawfully begotten heir of his body, then to his brothers and sisters. *Held*, that the devise to A. was of an estate tail, which by the act of 1784, is converted into a *fee simple*, and the ulterior limitation is therefore void. 1 Hawks, 247; 2 *ib.* 437—See also 2 Hay. 130; 4 Dev. 376, and 12 John. R. 169.‡

*It is not legal to devise a fee on a fee. 3 Atk. 617; 1 Ves. 89; 1 Salk. 238; 11 Mod. 207; Willes, 164. But the Court will in all cases effect the presumed intention of the the testator by restraining the first devise to an *estate tail*, if there are sufficient words to denote such intention. 3 Atk. 617.

†See title “Void Devises,” *post*.

‡Estates tail are not simply abolished and thrown back to fees, conditional at Common law, by the statute, but the statutes suffer the estate tail to arise, and then change it into a fee simple. 2 Cow. 333; 13 Wend. 437.

CHAPTER XIX.

CONTINGENT REMAINDER.

§ 1. A contingent remainder is an estate in remainder limited to take effect, either to a dubious or uncertain person, or upon a dubious and uncertain event; so that the particular estate may chance to determine and the remainder never take effect. Fearne, C. R. 216, (7th ed.)

But the person must be such as by common possibility may be *in esse*, and the event such as by common possibility may happen, before the termination of the particular estate. Subject to this rule, there may be a possibility on a possibility, and not too remote. Fearne, C. R. 251. A devise to A. and his male children, lawfully begotten of his body, and their heirs forever, to be equally divided among them and their heirs forever—passes a life estate to A. with contingent remainder in fee to his children, he having no children at date of the will. I Sumner's C. C. R. 235.

§ 2. It is not merely the uncertainty whether or not a remainder will ever take effect, that makes it contingent, because every contingent remainder is liable to like uncertainty—as the remainder-man may die, or die without issue, before the determination of the particular estate. The true criterion is, the *present* capacity to take effect in possession, if the particular estate should determine. If there be, the remainder is vested—otherwise, it is contingent. Fearne, C. R. 216, (7th ed.) 2 Hill's S. C. Ch. R. 44; I ib. 358; 5 Paige, 318.

§ 3. Whenever a contingent remainder is limited to depend on an estate of freehold, which is capable of supporting a remainder, it shall never be construed as an executory devise, but as a contingent remainder. 15 Pick. 104, 110. But although contingent remainders of a freehold cannot rest on any particular estate less than a freehold, actual seizin of the estate is not necessary—Ibid.

§ 4. Contingent Remainders are of four kinds—

1st. Where the remainder depends on the contingent determination of the preceding estate itself. But the existence of a power to appoint among a *class* of persons who are known and ascertained, does not render the remainder to the class contingent. The remainder vests in the class, subject to be divested as to some of the class by the execution of the power. 5 Paige, 318.—Where the testator did not intend to vest the estate in any of the remainder-men, until the power of appointment in their favor was executed, but made the right of the remainder-men dependent on the decision of the trustees in their favor, as to their moral character at the time appointed by the testator, for the vesting of the remainder in possession—*held*, the remainders were contingent during the precedent estate. 5 Paige, 318.

2d. Where the contingency on which the remainder is to take effect is independent of the determination of the preceding estate.

3d. Where the condition on which the remainder is limited, is certain, but the determination of the particular estate may happen before it.

Where the testator devised that *after the death* of his wife, his estate should be given to seven persons by name, and to the children of E. E.—*Held*, the children of E. E. *living* at the death of the wife took the eighth part, and no estate vested in E. E.'s children. 2 Hill's S. C. Ch. R. 44; 1 ib. 358. Where a contingent remainder is left to a class of persons by description, on a contingency disconnected with the persons, the estate vests in the person answering the description when the contingency happens. 3 Halst. 90; 2 South. 427.

4th. Where the person to whom the remainder is limited, is not yet ascertained or not yet *in being*. *Fearne*. C. R. 3, 4; *Sumner's* C. C. R. 305. For if the devisee be ascertained and is *in being*, who will if he lives, have an absolute and immediate right to the possession of the land, on the ceasing or failure of all the precedent estates, provided the estate limited to him in remainder continues to exist—his remainder is *vested* and not contingent. 5 Paige, 318.

§ 5. When a contingent remainder intervenes between the particular estate and the limitation over, if the intervening limitation be in fee, it is contingent—as a devise to A. for life, remainder to his unborn son in tail, remainder to B. in fee. (Under our statute, the intermediate limitation would become a fee, and the remainder over void.) Fearne. C. R.

§ 6. When a contingent remainder is given with remainder over to a person in being, capable to take, if the contingent remainder never takes effect, the remainder over will nevertheless be good. Fearne, 237, et seq.; 6 Halst. 244.

§ 7. A distinction exists where words only denote the time when a remainder is to take effect in possession, and those cases where they amount to a condition precedent. As, where there is a devise to A. till B. arrive at 21 years of age, and when B. shall attain that age, then to him in fee;—this is not a condition, but a limitation, and the remainder vests in B. (See title, Vested Remainder.) Tucker's Comm. ch. 9, p. 142.

§ 8. In limiting contingent remainders, it is necessary that the contingent event be—

1st. A legal one—and

2d. Not too remote. It must not be only a possible event, but a common possibility, as death—death without issue, and such like. Fearne, 250. There cannot be two contingencies. *Ibid.* The person must be such as by common possibility may be *in esse*, and the event such as by common possibility may happen, before the termination of the particular estate. Subject to this, there may be a possibility on a possibility, and not too remote. Fearn. 251. A contingent remainder may be limited on a contingent remainder, if the latter *must* vest in interest (if ever,) within the period of two lives in being at the creation, or termination of the preceding estate. 5 Paige, 318.

3d. It must not defeat the preceding estate. Fearne, 250.

CHAPTER XX.

EXECUTORY DEVISE.

§ 1. Contingent remainders are future estates, liable, until they actually vest, to be wholly destroyed. Executory interests, on the contrary, are future estates, in their nature, indestructible.—Fearn. 321.

§ 2. A contingent remainder requires a particular estate to support it. The reason is, the word *remainder* is a relative term, and implies a previous disposition of part of the thing devised.

It is a rule of Common law, that a freehold estate cannot be created to commence *in futuro*. But this rule applies only to estates in remainder, created *by deed*—it having long since yielded to the importunity of testators in the cases of *executory devises*. Comstock's Digest.

§ 3. Executory devises are of three kinds—two relating to real, and one to personal estate only, to wit:

1st. Where the devisor parts with the whole fee simple, but qualifies the disposition with a contingency, and limits an estate on that contingency. 4 Kent, 262. See also sec. 3, paragraph 2, *post*.

2d. Where the testator gives a future estate to arise upon a contingency, but does not part with the fee at present. Fearn. 302. Or where the testator gives a future estate, to arise upon an event certain, and unpreceded by any immediate freehold, to give it effect as a remainder. *Ibid.*—See sec. 4, paragraph 1.

3d. Where a term for years, or any other personal estate is bequeathed to one for life or otherwise, and after the decease of the legatee for life, or some other period or contingency, is given over to another—and thus whether the use merely, or the thing itself be bequeathed. Comstock's digest, 151; 2 Day, 28, 52—and see sec. 4, paragraph 3, *post*.

§ 4. Hence it may be perceived that an executory devise of lands is such a disposition of them, by will, that no estate vests

at the death of the testator, but only on some future contingency. It differs from a contingent remainder in these respects:

1st. An executory devise does not require a particular estate to support it.

2d. By an executory devise a fee simple or other less estate, may be limited after a fee simple.

3d. By an executory devise, a remainder may be limited of a chattel interest, after a particular estate for life created in the same. See 5 Yerger, 369.

§ 5. An executory devise is only an indulgence allowed to a man's last will and testament, when otherwise the words of the will would be void.

For wherever a future interest is so limited by a devise as to fall within the rules laid down for the limitation of a contingent remainder, such an interest is not an executory devise, but a contingent remainder. Comstock's Dig. 148; 15 Pick. 104, 110.

For examples, see----5 Yerger, 369; 3 B. Monroe, 487; 2 Cowen, 333.

§ 6. An executory devise limited to take effect upon the death of the first taker *without issue*, was at Common law held to be void on account of the remoteness of the contingency, as it could not take place until after an indefinite failure of issue. And that rule governs all cases of devises made by testators who died previous to the statutes. Now, however, it is declared by statute that in such case, issue shall be construed to mean issue *living* at the death of the person named as ancestor. 26 Wend. 229. See further on this head, "Void Devises."

CHAPTER XXI.

• VESTED REMAINDERS.

§ 1. A *vested* remainder is where the estate is *invariably fixed* to remain to a determinate person after the particular estate is spent. Toml. L. Dicty. 334.

§ 2. A remainder shall be considered vested rather than contingent—5 Mass. 535—even in case of doubt.—21 Pick. 311, 314; 5 Mass. 525; 4 Pick. 198; 2 Pick. 468, 469; 4 Dana, 572; 23 Pick. 287; 25 Wend. 119; 1 Watts. & S. 205; 3 Myl. & K. 257.

But the favor shown to vested estates is not to be so pressed as to defeat the intent of the testator. 7 Metcalf, 171;* 2 Mer. 38. Nor where the attainment of age is not the only circumstance fixed for the vesting of the estate, but a *preliminary* act is to be done by the devisee, before his title accrues. 1 Keen. 186; 1 Perk. Jarm. 742.

§ 3. The reason of the foregoing rule is, that a will takes effect at the testator's death, and therefore any devise or bequest in favor of a person *in esse* simply, (without an express or implied intent to postpone its operation,) confers an immediately vested interest.

If words of futurity are introduced into the gift, the question arises whether the expressions are inserted for the purpose of protracting the investing, or merely to defer the possession and enjoyment. 1 Perk. Jarm. wills, 726; Fearn, C. R. 329; 3 Durn. & E. 41; 9 E. 400; 1 Mau. & Selw. 692; 2 Brod. & Bing. 249; 1 Barn. & Cress. 721; Adol. & E. 636, recent case; 15 Ves. 29; 2 Mer. 138.

§ 4. Where a remainder is limited "*in default, or for want*" of the objects of the preceding limitation, these words mean, the determination of the prior estate, and do not render the remainder

*A contingent interest in a real and personal estate may so vest, that it will go to the real and personal representative of the person interested, if he dies before the happening of the contingency. 7 Chand. L. R. 181, 183—June, 1844; 7 Metcalf, 363; 4 Call, 321.

contingent on the event of such prior object not coming into existence. The remainder is, therefore, vested—absolutely expectant on the failure or determination of the prior estate. 1 Perk. Jarm. 728—citing 1 Bos. & Pull. 250; D. & E. 112; 4 Mau. & Sel. 88; 6 East. 336. Though a devise to a person, “if he attain a particular age,” is contingent; yet followed by a limitation over, in case he die under such age, the devise over explains the intention to be, that at his coming of age the devisee’s interest should become indefeasible and absolute—the interest therefore vests *instantly*. 9 Ves. 233; 3 Myl. & K. 257; 14 E. 601; 1 Mau. & Sel. 327; 9 Ad. & Ell. 582.

§ 5. The general rule is, that where a remainder is limited on the contingent determination of the preceding interest, and the prior gift in event takes effect, but is afterwards determined in a mode different from that which is so expressed by the testator, the *remainder fails*. 8 Vin. ab. 221; 3 Atk. 282.

But an exception to this rule exists in a case, where a testator makes a devise to his widow, for life, if she so long continue a widow, and if she shall marry then over; in which case, the devise does not depend on the contingency of the widow’s marrying again, but takes effect on *either* contingency whether of marriage or death. 23 Pick. 287; 3 Lev. 125; 1 Vent. 203; Amb. 209; 3 Atk. 282.

The distinction then is, where the non-marriage is of the original gift, the testator, having thus in the first instance created an estate during widowhood, must be considered, when he subsequently refers to the marriage, to describe the determination by any means of that estate, and consequently the gift over, is a *vested* remainder, expectant thereon. 1 Perk. Jarm. 733; 1 Hill’s S. Ca. Ch. R. 358. On the other hand, if the testator first gives an absolute estate for life, and then engrafts thereon a devise over to take effect on the marriage of such devisee for life; the conclusion is, the devise over is not to take effect, unless the contingency happens. 1 Perk. Jarm. 733—See also, 1 Durn. & E. 389.

And where a testator bequeathed a sum of money, a slave and her children to his wife, “to hold, &c. during her natural life, and at her death to descend to her grand-daughter”—*Held*, that the legacy in remainder to the grand-daughter *vested* immediately,

and did not depend on the widow's acceptance or renunciation of the will. 5 Dana, 347; 4 Dana, 570.

§ 6. A devise over after payment of debts, is a vested interest—the words of apparent postponement being considered as only creating a charge. 1 P. W. 505; 1 Ves. 142.

§ 7. An estate will be construed to be contingent, if clearly so expressed, however absurd and inconvenient may be the consequences to which such a construction may lead; and however inconsistent with what it may be *conjectured* would have been the testator's actual meaning, if his attention had been drawn to these consequences. 4 Kent, (5th ed.) 406; 21 Pick. 311; 14 Pick. 108; 6 Durnf. & E. 512; 1 P. W. 401; 3 Ves. 317; 6 Dow. 22; 1 Ves. 562.

But where the construing of a devise to be contingent, conformably to its letter, would render nugatory a purpose clearly expressed by the testator, the Courts will avoid such a construction. Doug. 63; 3 Mau. & Selw. 25.

§ 8. As a devise expressly made to take effect on a contingency will not arise unless such contingency happen, it follows, *a fortiori*, that an estate once vested, will not be divested, unless all the events, which are to precede the vesting of a *substituted* devise, happen. 7 E. 269; 2 B. & Ald. 441; 12 E. 288; 5 Ves. 207; 9 Sim. 644; 3 Madd. 410; 1 Kee. 238; 2 Jac. & Walk. 459; 2 Kee. 590.

§ 9. When a contingent particular estate is followed by other limitations, a question frequently arises, whether the contingency affects such estates only, or extends to the whole series. The rule seems to be, if the ulterior limitations immediately follow the particular contingent estate, the whole will be presumed to hinge on the same contingency. 2 P. W. 390; Doug. 75; Fearne, C. R. 236; 16 Ves. 283; 4 Dana, 573; 5 ib. 439.

A contrary rule prevails in two instances—1st. Where the words of contingency are referrible to an intention of the testator in regard to that estate, in contradistinction to the others. 1 Durn. & E. 346; Hutt. 119; Doug. 63.

2d. Where the ulterior limitations do not follow the contingent estate, in the nature of remainders, but as independent, substantive gifts. 2 Sim. & Stu. 199. For further information, see title "Legacy," *post*.

A legacy may be *vested*, though payable at a future period. 2 M'Cord's Ch. R. 258; 3 Peters, 379.

Where a husband bequeathed to his wife the management of his estate, during widowhood, and a child's inheritance of the same, in case of second marriage—*held*, that it gave a *vested* legacy on the death of the husband. 7 Howard, 425.

CHAPTER XXII.

ESTATES ON CONDITION.

§ 1. Conditions are precedent or subsequent—

If precedent, the estate devised cannot vest, till the condition be performed. If subsequent, the estate will vest subject to forfeiture, if the condition be not performed. 1 Perk. Jarm. wills, 796.

§ 2. Very slight circumstances will go to show that a legacy is vested and not conditional. 4 Dana, 572. Conditions which go to defeat estates are odious, and to be construed strictly. Shep. T. 129.

§ 3. It is a well settled rule that there are no technical appropriate words, which always determine, whether a devise be on a condition precedent or subsequent.

The *same* words have been determined differently, and the question is always one of intention.

If the language of the particular clause, or of the *whole* will, shows that the act on which the estate depends must be performed before the estate can vest, the condition of course is precedent; and unless it is performed, the devisee can take nothing. If, on the contrary, the act does not *necessarily* precede the vesting of the estate, but *may* accompany or follow it—if this is to be col-

lected from the whole will, the condition is subsequent. 3 Peters, 377.

The result of these two principles is, that a devise to A. on condition that he shall marry B. (if uncontrolled by other words,) takes effect *immediately*, and the devisee performs the condition if he marries B. at any time during his life. 3 Peters, 376. And where the words of the devise are, "In case of leaving no children, I leave and bequeath all my real estate, at the death of my wife, to William King," the *whole* estate is devised to William King, but the possession of the real estate devised to the wife for life, is postponed, till after death. 3 Peters, 379.

I. CONDITIONS PRECEDENT.

§ 4. Where a testator devised an estate to his sons, they jointly and severally paying to each of his two daughters, a certain sum within one year after his decease—*Held*, this was a *conditional* devise, and the performance of the condition within the year, was necessary to entitle the sons to the estate. 2 Conn. R. 796.

A devised one-fourth of his real estate to be appraised according to law, retained by his executors, and the interest thereon annually paid to his daughter H. during the minority of her children, and the principal to the children as soon as they become of age—*Held*, that an estate was given to the executors *upon the condition* they should perform the directions of the testator, in relation to his daughter and her children. 7 Conn. R. 205.

A testatrix used language in her will showing her reason for her bequest, and her expectation to be, that an advancement made by her husband to her son would be brought into *hotch-pot*—*Held*, that a compliance with this expectation was a condition of the legacy. 1 Dana, 199.

For other examples, see 1 Perk. Jarm. 796, et seq.

§ 5. The argument in favor of a condition being precedent, is stronger where a gross sum of money is to be raised out of land, than where it is a demise of the land itself—where a pecuniary legacy is given, than a residue—2 P. W. 626—where the nature of the interest is such as to allow time for the performance of the act, before its usufructuary enjoyment commences, than where not—Willes, 153—where the condition is capable of being per-

formed *instantly*, than where time is requisite for the performance—4 Burr. 1940. While, on the other hand, the circumstance of a definite time being appointed for the performance of the condition, but none for the vesting of the estate, favors the supposition of its being a condition subsequent. 1 Salk. 170; 2 Scott, 67.*

CONDITIONS SUBSEQUENT.

§ 6. Where there is a general devise in words importing a present interest, in a will making no other disposition of the property, on a condition that may be performed at any time, the condition is subsequent. 3 Peters, 376; 9 Wheat. 325.

A. gave his estate to his wife and children, and inserted in his will the following clause—My executors shall retain in their hands one equal share of my estate, which they shall give in equal portions to my three grand-children, (naming them,) equally, when they marry or come of age—*Held*, the interest of the legatees is *vested*, and not contingent, and at the death of either legatee his portion would go to his heirs. 4 Dana, 570.

A devise of land “for the purpose of building a school-house, for the use of a school provided it be built” on a certain site, is on a condition subsequent. 5 Pick. 528.

So, of a devise of land to a town, to use and improve forever, and not to be sold but rented out, and the rents applied to the ministry of the town. 10 Pick. 309. See also, Cro. El. 795; 1 Vern. 79; 2 P. W. 626; 4 Burr. 1929, cited in 1 Perk. Jarm. 801; In the case of *Peyton vs. Bury*, where one bequeathed the residue of his personal estate to S., provided she married with the consent of A. and B. his executors in trust, and if S. should marry otherwise, then the said residuum to W. A. died, after which S. married with the consent of B.—*held*, that in the nature of the thing and according to the intention of the testator, this could not be a condition precedent; for, at that rate, the right to the

*Where testator bequeathed certain negroes to his helpless daughter B., and then declares, “I allow my daughter M., to take care of my said daughter B., and at her decease I allow my said daughter M. to have the said negroes to her and her heirs.” &c.—*held*, a bequest, on condition, that if M. should not take care of B., the remainder would not vest, and the negroes might be sold for the support of B. 1 Wills. Ch. R. 55.

residue might not have vested in any person whatever, for twenty or thirty years after the testator's death, since both the executors might have lived, and S. have continued so long unmarried, during all which time the right to the residue could not be said to be (beneficially) in the executors, they being expressly described only as executors in trust. 2 P. W. 626. The testator meant that marriage without consent was to be a forfeiture. The case is analagous in principle, to those, in which a devise or bequest if the object shall attain a certain age, with a gift over in case he shall die under that age—is held to be vested *instantly*. 9 Ves. 233; 3 Myl. & K. 257. See also 2 Atk. 16.

EFFECT OF CONDITIONS PRECEDENT AND SUBSEQUENT.

§ 7. Where a condition *precedent* becomes impossible to be performed, the devise fails. 2 Edw. 78; 4 Kent, (5th ed.) 125.

But if the performance of a condition *subsequent* be rendered impossible, the estate to which it is annexed becomes by that event absolute. 2 Story's Eq. Jur. S. 34, et seq.; 4 Kent, (5th ed.) 129, 130; 10 Pick. 507; 9 Wheat. 489.

If the performance be rendered impossible by the act of the grantor, the condition is void. 6 Peters, 691, 745. 4 Cowen, 39.

Where a condition is not a condition precedent, but subsequent, the estate will vest immediately; but a subsequent performance is necessary in order to prevent the forfeiture of the devise, (unless such performance be rendered impossible, or is illegal, or inconsistent with the nature of the devise—in which case the condition will be void, and the devise shall stand.) But it is otherwise if the condition be precedent.

Where the devise is on a condition subsequent, it may be construed as regards time of taking possession, as if there were no condition at all, and it opposes no obstacle to immediate possession, if the intention of the testator requires that construction.—3 Peters, 376.

Ann Smith devised to John Smith a plantation and tract of woodland, during his natural life, and *after* his death, to such of the lawful issue of the body of said John Smith as should arrive at the age of twenty-one years, and to the survivors of such issue: *Provided*, also, the said John Smith should convey by a good and

sufficient conveyance in law, unto Israel Smith the son of Hill Smith, all his John S's. title to his father's real estate: and provided also, the said John S. should release all accounts and charges against her or her executor, and all accounts against Israel Smith, above named; and in case of said John Smith's refusal to make such conveyance to the said Israel Smith, then his devise to be void, and in that case the testatrix devised the said plantation to Israel Smith, and the heirs of his body. John Smith died in the life-time of the testatrix, leaving three children all under age, and without having made any conveyance to Israel Smith, of the real estate of his father, and without any release as required—*Held*, the condition of the devise to John S. not having been complied with, the devise to him and his issue failed, and the devise over to Israel took effect. 6 Halstead, 244.

A testatrix living in the family of B. willed as follows: "I will, (loath to offend by the word "pay," the feelings of my friends, whose kindness has been long continued, &c.) to B. and his wife a certain lot of land:"—*Held*, this was a conditional devise forfeited by B.'s commencing suit for board of the testatrix, and that the condition did not affect a residuary bequest in the same will. 22 Pick. 480.

§ 8. A condition, in view of the Common law, is regarded as impossible, only when it cannot by any human means take effect. But if it be only in a high degree improbable, and such as it is beyond the power of the obligee to effect, it is not then deemed impossible. 2 Story's Eq. Jur. S. 1305—See 1 Salk. 170.

§ 9. Where there is a devise over on *non-performance*, the estate of the first devisee will be absolute, and would take the property from the substituted devisee, in the event on which the testator has given it to him. 1 Perk. Jarm. 808—reviewing 1 Eq. cas. ab. 112, pl. 112, which set up a different rule.

§ 10. Where the heir is also the devisee, notice of the condition to him is necessary, as his entry is by descent, and not by devise, and he is not therefore cognizant of the condition. 11 East. 667. Such notice must be proved, and will not be inferred. 8 Ad. & Ell. 778.

WHEN PAYABLE?

§ 11. Where there is a bequest of *personally* to be divided among several, at a *future* period, no interests vests in the legatees till the division takes place. 4 Dana, 547.

Where *land* is devised to several devisees to be divided at a future period, (as when a son becomes of age,) an interest in the land and its incidents, vests in the devisees at the death of the testator. *Ib.* 547. The rents of such land accrued before the testator's death, go to his executor. *Ibid.*

The reason is, that no title can be made to an estate depending on a condition or contingency, without showing that the condition or contingency has actually come to pass. 3 Harr. (N.J.) R. 27. Therefore, where there was a devise of six slaves, with *choice* to one of the devisees, on his arriving at 21 years of age, marriage, or death of the mother to whom the intermediate use is given—*Held*, that the devisee can only select on the happening of some one of the contingencies contemplated—1 B. Monroe, 274—and an abatement of the devise to make up for a *posthumous* or pretermitted child, does not alter the rule. *Ib.* 275. But see 4 Dana, 562; 2 Murphy, 140; 1 B. Monroe. 31.

But where a legacy is given to be divided and paid over when a certain event shall have occurred, as when daughters shall have had their last child, a reasonable certainty that the event has happened, (though it possibly has not,) will entitle the legatees to decrees of their legacy; especially if they give bond to indemnify the executors against the possible contingency of an over-payment. 5 Dana's repts. 73. (See Legacy, *post.*)

§ 12. If A. direct that his wife and daughter-in-law shall jointly possess and occupy the plantation, whereon he then resided, during his wife's life, and after her death, if his daughter-in-law shall not then have married again, but continue to live in a state of widowhood, then to her use, till her two children shall arrive at the age of 21 years, and then her said children to have the entire and absolute property thereof—*Held*, that if the daughter-in-law marry, before the wife dies, the estate vests immediately in the children, and is not contingent on the daughter-in-law continuing in a state of widowhood. 7 Mon. 388.

§ 13. A devisee cannot hold any thing adversely to the testator and take a legacy under his will, except on condition of surrendering the disputed property. 1 Dana, 203; 1 B. Monroe, 116; 17 Pick. 303; 1 M'Cord's Ch. R. 360. An election to take under a will or against it, is enforced only in clear and well defined cases—4 Dana's R. 3—and according to some authorities it cannot be enforced unless the devisee's title existed when the testator died. 4 Dana's R. 3.

§ 14. There is a distinction recognized between cases, in which the *devise* depends on the contingency, and those where the *division* depends on it—and so *vice versa*. 6 Dana, 160, 161.

An example of a *devise* depending on a contingency is afforded in the case above cited, as follows: The testator devised *all* his estate so his wife, (including *eleven* negroes,) *during widowhood*, and *one-third* if she married again, (not saying how the *other two-thirds* should in that event be disposed of, but directing, in *another* item of the will, that, "when the first of his children should marry, *one-third* to his wife, if she should remain his widow, the balance equally among his children,") and some two years after the testator's death his widow married, and *ten* years after that, *one* (the first) of his children married—it was *held*, that by this will the devise to the children did not vest to take effect on the marriage of the widow, but was contingent on the marriage of one of them—an event that might never happen; consequently, when the widow, by *her* marriage, was divested of *two-thirds* of the estate, that portion being slaves, and then undevise, passed to the administrator or executor of the testator as assets.

But if the devise had been, that *on the widow's marriage*, two-thirds should go to the children, *to be divided* among them, *when* either of them should marry, the uncertainty whether either of them ever would marry, would not have affected the devise, but *till* that event, they would have been tenants in common, immediately on their mother's marriage. 6 Dana, 160, 161.

§ 15. And *pari ratione*, where the time of payment, and *not* the *substance* of the devise, depends on the contingency, the interest vests immediately on the death of the testator. As, in case of a legacy payable to a man at, or when he attains the age of 21

years. But, if the substance of the devise, and not only the time of payment depends on the contingency, the interest will be contingent. As if a legacy be to a man at, or if, or when, he attains the age of 21 years. 2 Murphy, 140; 4 Dana, 572.

In the latter case the legacy will lapse, if the legatee die before he attain the age of 21 years. In the former case it will not lapse. 2 Murphy's N. C. R. 140.

§ 16. A legacy to an infant, to be paid to him on his majority, is vested, and properly paid to a testamentary guardian, appointed to receive it. 1 B. Monroe, 31; 4 Dana, 572. See "Legacy," *post*.

But, where a man by his will devised real estate to three sons, adjudged to be illegitimate, "if they should live to come of age," it was held, that *during* their minority the property went to the heir at law. 7 Wend. 47.

§ 17. It will be observed by the reader, that the distinctions created by the Courts in relation to conditional devises, are often so nice, and technical, as hardly to fall within any general rule on the subject. The intention of the testator being at last the object to be effected, the language of the devise must, in each case, govern, unless so obscure as to compel the Courts either to exercise a wide discretion, or to pronounce the devise insensible and void. It is in such cases only that the technical rules created by the foregoing decisions are useful, as fettering judicial discretion within reasonable limits. It is only by studiously investigating all the foregoing decisions, that the practitioner or judge can properly apply these rules, to such new cases as may arise.

CHAPTER XXIII.

VOID DEVISES—WHAT?

§ 1. However inclined the judges may be to effect the intention of the testator, if possible, yet where he makes *the same* disposition of his property that the law would have done, had he been silent—or, where the disposition is made in such *general* terms that his intention is uncertain, and cannot be collected from the words of the will—or, where he seeks to establish a settlement against the reason and policy of the law—the judges have thought fit to reject the will.

Therefore, if a man devise to J. S. and his heirs, who is heir at law, the devise is void, and J. S. will take by descent: Vin. abr. *Descent*, (1.)—6 Mass. R. 169; 3 Marsh. 230; 2 Binn. 19; 1 Wash. 109; 1 Call, 258; 1 Leigh, 390; 14 Mass. 88; Ram. wills, ch. 2, sec. 4; Pow. dev. 421—otherwise, if the devise be of a particular estate to the heir, and a remainder over; for then, the heir will take by the devise. Watk. descent, 272. But if there be no remainder over created by the devise, the devise of the particular estate to the heir is void, because the fee simple would descend on him and drown the particular estate. Ib. 274, and Ram. on wills, 17.

So, if he devise lands to his wife for life, with remainder to J. S. (who is heir at law,) in fee—because, without such will, the reversion would have descended to J. S. in fee. Roll. abr. 626, (1) pl. 2; 1 Black. R. 187.

An appointment by will, is subject to the same rule. 1 Bl. 187; Sugden on Powers, 323; 1 Str. 487; Watk. on descent, 268; 5 Maul. & S. 14; 1 Ld. Raym. 728; Com. R. 72; 1 Bl. 22; 2 Saund. 8, d.; Co. Litt. 12, 5, n. 2; 1 Barn. & A. 547; 3 Lev. 137—or where estate is charged with debts—1 Wash. 109; Ram. wills, 18; 5 Maul. & Sel.

In case of an executory devise, the heir at law will take by descent, till the event happens on which the devise depends. 1 Barn. & A. 530; Amb. 383.

If only the *quality* of the estate be altered, as if lands be devised *in trust*, the devise is not void. 15 Ves. 363.

And wherever the devise gives a *different* estate from that which would have descended to the heir-at-law with such devise, it will be good though given to the heir-at-law. 1 Leigh, 368; 15 Ves. 371; Ram. wills, 18.

As if a man has issue only two daughters, and devises land to them and their heirs: this is good, because this devise makes them joint tenants on which *survivorship* takes place; whereas, had they taken by descent, they would have been as coparceners. 3 Lev. 127. See also Watk. on descents, 271, 274; 2 Ld. Raym.

Or, if the devise be to the heir-at-law, and a stranger. 1 H. Bl. 1; 1 Salk. 242; 2 Ld. Raym. 829; Ram. wills, 18; Com. R. 123.

But it would be mischievous, if every little legacy should alter the descent; therefore, where a person devised lands to his wife for life, and after her decease to her next heir-at-law, and his or her heirs—*provided*, such heir should pay \$1000 to such person as his wife should appoint, it was decided that his heir took by descent and not by will. Com. R. 72.

It is said that the test of the foregoing rule, is to strike out of the will the devise to the heir; and then if he take exactly the *same* estate as that given him by the will, he will be in by descent and not by purchase. Crosby's will, 101.*

§ 2. All devises against the reason or policy of the law, being rejected—therefore devises which tend to a *perpetuity*, are void. Therefore a devise to J.S. and his heirs, with remainder to J.D. & his heirs, is *void*, because the law does not allow one fee, to be limited upon another. By the devise to J.S. and his heirs, the deviser parted with his *whole* estate to him, and therefore the limitation over must be void. Nor, can any man say when the heirs of J. S. will fail, and to allow a remainder over on such a distant contingency, is to perpetuate the estate in the family of J. S. to support a remainder which may never vest. Co. Litt. 18; 3 Ch. C. 35.

So, where the devise was to A. and his heirs, and if he should

*When a devise is void by the rules of law, the land goes to the heir and not to the residuary devisee—unless such intention appears on the face of the will. 3 Har. & McH. 333; 1 Har. & J. 421.

die *without issue*, living at his death, then so much of his estate as should remain undisposed of by A. should go to B. the limitation over was held to be void, both for uncertainty and because the power to dispose of the property gave an absolute property to A. 4 Leigh, 547; 2 ib. 385; 13 John. R. 537; 15 ib. 169; 16 ib. 537. The same rule applies to real and personal estate. 16 John. 537; 3 Ves. 7; 1 Mer. 314.*

By the law of England a remainder might be limited on an estate tail. Fearne, C. R. 522. But this rule does not hold in the United States, where by operation of law every estate tail is converted into a fee simple, But a devise may contain a limitation in fee, *to be substituted* for a precedent devise in fee, on the failure of the latter.

A remainder to the child of a person unborn, will not, under any modifications be endured. Fearne, C. R. 502; 2 Cas. & op. 432; 1 Eden. 415, 416. This would be a possibility on a possibility, which is never admitted. Fearne, C. R. 251, 561, note [h.] II.—5 Ves. 457; 11 Ves. 257; 2 Ves. 54, 57, 62.

A limitation over after an indefinite failure of issue, is too remote, and therefore void. 4 Rand. 457.

§ 3. A bequest is void if by possibility it may postpone the vesting of the absolute interest in the thing devised, for a longer space than a life or lives in being, and 21 years, after allowing a few months more for gestation. 9 Ves. 134; 11 Ves. 283—See also 1 Simons, 173; 1 Saund. U. & T. 197; 7 T. R. 100; 2 Sim. & Stu. 465; 1 Russ. 382, 394.

§ 4. Devises are void, where the words of the will are so general and uncertain that the testator's meaning cannot be collected from them. As, if one gave "*all* to his mother," the *lands* would not pass, because it would be severe and unreasonable to disinherit the heir, where such intention is not clearly evident. 1 Swans. 201, and note, 203; Raym. 97.

*To determine the validity of a limitation it must be considered whether it is an *executory devise*, or a *remainder*. If it may take effect as a remainder, it shall not take effect as an executory devise. Fearne, C. R. 394; 2 Yeates, 400; 3 S. & R. 441; 1 Watts, 475.

If there be a sufficient freehold estate to support a remainder, it shall never be considered an executory devise, but a contingent remainder. 2 Sand. 380; 2 Bl. rep. 777; Doug. 753; 3 T. R. 763; 4 East. 259; 2 Bos. & Pull. 289, & ib. 324.

But the will must be incapable of any clear meaning, and not merely irrational and absurd. 2 Sim. & Stu. 295; 3 Halst. 90.—And—

§ 5. 1st. A will may be void for the uncertainty of the *thing* devised. 9 Sim. 503, 524.

2d. By the uncertainty of the person to take—Abr. Eq. 212; 4 Paige, 271; S. C. 1 Edw. 189—As, if there be two persons to whom parts of the description given of the devisee respectively apply, it becomes a question which is intended, and if their claims are nearly equal, the devise is uncertain and void. *Ibid.*

Testator devised all his real and personal estate, subject to his debts and other charges, to his wife for life, and after her death, the same should be divided according to the statute of distributions in that case made and provided—*Held*, the devise over of the real estate was not sufficient to designate the persons intended to take, and was therefore void. 3 B. & C. 825; Vern. 362; 3 Bro. P. C. 454; 2 Mer. 348; 3 East. 172; 1 Swanst. 201; 1 Ves. & B. 422; 11 Mass. 419; 2 Russ. & Myl. 107; 6 Har. & John. 1; 5 Har. & John. 399.

§ 6. A will may become void by death of the devisee, in the life-time of the devisor. As, if land be devised to A. and his heirs, and A. dies before the testator, the heirs of A. take nothing; for they were only named to designate the *quantity* of the estate devised to A. 1 Str. 25, 445; 1 P. W. 397; Doug. 344; 2 Vern. 722; 1 Bro. Ch. R. 319; 7 Mass. R. 86; 5 Binney, 118; 3 Yeates, 34.

And a new publication of the will after A.'s death, would not make such a devise good. 4 T. R. 601; 1 Mod. 267; 2 Mod. 313; 11 East. 551, in note.

But in case of a charitable bequest, the death of the devisee does not avoid the bequest. Prest. abst. 238. Chancery would treat the heir as trustee—*Ibid.*—Otherwise, if the *cestuy que use* die. 3 Lomax, dig. 112.

In case of a lapsed devise in fee, the estate will not go to the residuary devisee, but to the heir-at-law. Ram. wills, 262; Fortesc. 182, 184. This rule depends on these three propositions:

1st. The intent of the testator ought to be taken as things stood at his will.

2d. The testator in his will having given away all his interest in certain lands, so that if he were to die immediately nothing would remain undisposed of, he could not intend to give any interest in those lands to the residuary devisee. Willis' R. 293; 3 Lomax, 118.

3d. The intent of the testator, when not illegal, ought always to govern. *Ibid.*

In this respect a legacy differs from a devise; for in a like case, a legacy will pass to the residuary legatee, if specific or pecuniary. 4 Kent's Com. 541; Ram. wills, 262; 1 Dana, R. 207; 4 Paige, 115. For a will operates on all the personal property of the testator owned at his death. *Ibid.*

But if there be four residuary legatees, and *two* of them die in the life-time of the testator, their shares will go, as in case of intestacy. 2 Leigh, 650; 3 Lomax, 118; 5 Pick. 528, 537, 538; 2 How. 337; 2 Sm. & M. 30, 60; 1 Sm. & M. Ch. R. 589; 1 Dana, 206.

The distinction in England, by which in case of a *lapsed* devise, the heir takes; but, in case of a *void* devise, the residuary devise may take, (4 Kent, 525-6)—has been overruled in this country, because, the testator is presumed never to have intended that a void specific devise should fall into the residuum. *Ibid.*—and 6 Conn. R. 292. A devise *void* for uncertainty of legatee, will go to him to whom testator gives all his estate not before disposed of. 5 Pick. 528, 537, 538. So, if he dies or becomes incapable before the making of the will. *Ibid.*

But where the devise was on a condition subsequent, and also a contingent interest depending on the failure of that condition, the residuary devisee was held to be entitled to the estate in preference to the heir—5 Pick. R. 528—because the specific interest had not been contingently devised. 4 Kent, 525.

But wherever the law has been so altered by statute, as to make devises operate on all the real estate owned by the testator at his death, (see *ante*, page 104, 105,) it may destroy the application of these distinctions, and give consistency and harmony to the testamentary disposition of both real and personal estate. 4 Kent, 525-6.

And if an estate is devised to one, and, in case he dies without issue, to another, and the first devisee dies in the life-time of the testator, the devise does not lapse, but passes to the second devisee. 1 Dana, 43; 6 Dana, 52. And if it be plain that the intention of the testator was, that if the devisee died, his heir or executor should take the subject of the legacy, it will not lapse, but the executor or heir will take it, not *as such*, but by the will. 6 Dana, 52-3. See also 3 Bibb, 209.

By statute of Mississippi, it is provided that, "whenever any estate of any kind shall or may be devised or bequeathed by the last will and testament of any testator or testatrix, to any person *being a child or other descendant* of such testator or testatrix, and *such devisee* or legatee shall, during the life-time of such testator or testatrix, die testate or intestate, *leaving a child* or children, or one or more descendants of a child or children, who shall survive such testator or testatrix—in that case such devise or legacy to such person, so situated as above mentioned, and dying in the life-time of the testator or intestate, *shall not lapse*; but the estate so devised or bequeathed shall vest in such child or children, descendant or descendants of such legatee or devisee, in the same manner as if such devisee or legatee had survived the testator or testatrix, and had died unmarried and intestate." How. & H. ch. 36, p. 386.

§ 7. A devise may also be void for repugnancy, or at least so much thereof as is repugnant to the principal devise—as, if a condition be annexed to a devise, that the person who may have the right, is to procure an act of the Assembly for the change of his name, "together with the taking of an oath before he has possession, that he will not make any change, during his life in this my will, relative to my real property." Such a condition is repugnant to the nature of the estate, and is therefore void. 9 Wheat. 325—So of a devise in fee with a condition not to alienate—8 Mass. 3—So, if there be an executory devise after a devise with absolute power of disposition in the first devisee. 3 Bro. P.C. 314; 1 Ves. 9; 8 ib. 248; 5 Mass. 500; 10 John. 19; 2 Caine's R. 345; 13 John. 537; 15 John. 169; 16 ib. 537; 4 Leigh, 547; 2 ib. 385; 1 Mer. 314; 1 Jac. & Walk. 154.

Therefore, a condition exempting *such* devise from liability for

the debts of the donee, would be void, though given to trustees for his use. 18 Ves. 439; 1 Rose, 197; 1 Sim. 66; 1 Russ. & Myl. 395; 6 Sim. 524; 1 Perk. Jarm. 820, *et seq.*

A condition annexed to a bequest of leasehold property, that the legatee assign part to a charity, is void. 6 Mad. 32.

§ 8. In general a condition annexed to a devise for life, that it shall be divested by the devisee's *marriage*, is considered as intended only *in terrorem*, and the condition is therefore void—6 Mass. R. 169—unless the particular bequest is expressly given over, so as to create an interest in another person, to take effect immediately on the marriage. *Ibid.* See also 1 Perk. Jarm. 837, note [a.] A condition that a devise shall be divested on the marriage of the devisee or legatee, is void—because in restraint of marriage. 21 Pick. 42; 8 Mass. 3 & 6; 6 ib. 169.

But a condition requiring legatee to ask consent—2 Vern. 573; 2 Atk. 616; 10 Ves. 230—or that a widow shall not marry—Amb. 209—(but see 6 Mass. 169)—or that an annuity shall last during widowhood—2 Vern. 308; 1 Story, Eq. Jur. S. 285—or to marry or not marry T.—1 Vern. 19; 1 B. C. C. 55—is a valid condition. So, a condition prescribing due ceremonies and place of marriage, is good—1 Moll. 611—or limiting time to 21 years of age, or any reasonable age—3 Ves. 89—provided it be not used as a cover to restrain marriage generally—2 B. C. C. 488; 3 Ves. 89; 1 Story, Eq. Jur. 283—all cited in 1 Perk. Jarm. 837, & notes.

§ 9. At Common law, a devise limited to take effect on the death of the first taker *without issue*, was void for *remoteness*—as it could not take place till after an indefinite failure of issue. See *ante* page 133, sec. 5.

It is a settled principle, that wherever an estate is devised to one generally, with remainder over, on a *limited* contingency, as upon his dying under 21 years of age, the first devise shall take a *fee simple*. For, if the intent were to give only a life estate, with a remainder over, there would be no reason for limiting to death under age. 1 Gallis, C. C. R. 454; 1 Mason's C. C. R. 234.

But there are cases in which the ordinary import of words is restrained to carry into effect the apparent intent of the testator: where, therefore, A. devises to one of his heirs and upon an indefinite failure of issue, a remainder over, the word heirs is restrain-

ed to the heirs of his body, in order to give effect to the remainder over, which, otherwise, would be too remote and void. 1 Gallis, C. C. R. 454.

So, if the devise be to one and his heirs, and upon an indefinite failure of heirs, to one who might be an heir to the first devisee, his estate is restrained to a fee tail, for he could not be without heirs while the second devisee existed; and therefore it is plain, that, by the word "heirs," the testator meant "heirs of his body." But if the devise over had been to a *stranger*, the general meaning of the word "heirs," would prevail, and the estate being *too remote*, would be void as an executory devise. (In Mississippi, it would in either case, under our statute be a fee simple.) *Ibid.* See also 2 Cowen, 333; 4 Wend. 277.

§ 10. And although the general rule is, that the words "dying without issue," in reference to freehold estates are to be construed as meaning an *indefinite failure* of issue, unless there be something in the context that manifestly confines the sense to a different period of time, yet in respect to terms of years, and leasehold estates, Courts are liberally inclined to limit the words "dying without issue," to the time of the person's death. But in regard to the *freehold*, the rule has been rigidly enforced, unless there were strong circumstances to repel it. 3 Wash. C. C. R. 369; 12 Wheat. 568.*

§ 11. A limitation over in a devise, as, "I give, devise and bequeath unto my six sons, &c. all my real and personal estate, share and share alike, &c.—and if any of the above six should happen to die without heirs, then his or their share to fall to the survivors of the above named sons, share and share alike"—is good as an

*A. devised to his wife until his son P. should attain the age of 21 years, and after that his son P. should enter into possession of a moiety, and added, "I do hereby devise and dispose of the whole of the reversion of the aforesaid and real estate to my son P. to be and to remain to him and his heirs and assigns forever; but if my son P. should die before *he attain the age of 21 years, or without lawful issue*, then the aforesaid devised premises, &c. to descend to my male heirs in fee simple—*Held*, P. took an indefeasible estate, in fee simple on his attaining the age of 21 years.—3 Mason's C. C. R. 208. "Or" will be construed *and*, so as to defeat the second devise, either by the first devisees attaining age or having issue. And the reason is, that otherwise, if the first devisee should die *under age*, altho' having issue living, the estate to him would be defeated contrary to the manifest intention of the testator. 1 Mason's C. C. R. 234. See also 2 Leigh, 119; 3 ib. 64; 10 Conn. 448.

executory devise, to vest in the surviving brothers the share of one of the devisees, on his "dying without issue." 4 Wend. 277; 11 John. R. 337; 1 ib. 440; 16 ib. 382; 10 ib. 12; 2 S. & R. 470; 26 Wend. 229.

§ 12. But an executory devise must vest during lives in being, or 21 years and a fraction after. 15 Pick. 104; 8 Mass. 3, 37, 38. See also Perk. Jarm. 221, & note 1, citing 8 Paige, 104; 14 Wend. 265, & 5 Paige, 318; 16 Wend. 61; 20 ib. 564; 1 Hoff. 344; 4 Kent, (5th ed.) 271, *et seq.*

§ 13. A possible addition to the period of gestation, to a life and twenty-one years, occurs in the ordinary case of a bequest to A. (a person of the *male* sex,) for life, and after his death to such of his children as shall attain the age of 21 years, or indeed, in case of a devise or bequest, simply to the children of A. (a *male*,) who shall attain majority, though not preceded by a life interest. In either case, A. may die leaving a wife *enceinte*, and as such child would not acquire a vested interest until his majority, the vesting would be postponed till a period of 21 years beyond a life in being, with the addition, it might be, of nine or ten months. And if, we add the circumstance, that the parent were an infant *en ventre sa mere*, at the testator's decease, there would be gained a double period for gestation. To treat the period of gestation as an adjunct to the lives, is not quite correct. It is more proper to say, that the law regards the child *en ventre sa mere*, as a "life in being."

The application of this rule instantly shows, whether an executory interest to arise on an indefinite failure of issue of any person living or dead, is void for remoteness. 1 Perk. Jarm. 223, *et seq.* citing 3 J. J. Marsh. 91; 1 Hill. Ch. 268; 5 Munf. 457; 6 ib. 114; 1 Dev. & Batt. Eq. 69; 1 Bailey, Eq. 48, 390; 5 Day 5, 17; 11 Wend. 259; 26 ib. 229—and other authorities.

§ 14. And where a devise is void for remoteness, all limitations ulterior, or expectant on such remote devise, are also void. H. Black, 358; 1 Perk. Jarm. 242.

§ 15. In Mississippi, it is enacted that "any person may make a devise to a succession of donees *then living*, and the heir or heirs of the body of the remainder-man, and in default thereof,

to the right heirs of the donors, in fee simple. H. & H. ch. 36, sec. 24, p. 348—See *ante* page 122, sec. 2.

It is also further enacted, that every contingent limitation in a *will* or deed, made to depend on the *dying* of any person *without heirs*, or *heirs of the body*, or, without issue, or issue of the body, or without children or offspring or descendants, or *other* relative, shall be held and interpreted a limitation to take effect *when* such person shall *die*, *not having* such heir or issue, or child, or offspring, or descendant, or other relative, (as the case may be,) *living at the time of his death*, or born to him within *ten* months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared on the face of the deed or will creating it." H. & H. ch. 36, sec. 34, p. 348.

The above statute fixes the lawful period of limitation to be a life or lives in being, and twenty-one years and ten months thereafter.

§ 16. Devises are also void, when in contravention or violation of the Constitution and law of the State.

By Constitution of Mississippi, sec. 1, title "Slaves," H. & H. 34, it is provided that the Legislature shall have power to pass laws to permit the owners of slaves to emancipate them, saving the rights of creditors and preventing them from becoming a public charge. Art. VII.—General provisions.

By act of the Legislature, it was not lawful for the owner or owners of slaves to emancipate them or any of them, unless by his or her last will and testament, or by any other instrument in writing, under his, her or their hand and seal, attested and proved, in the manner required by law, by two credible witnesses, or the instrument of writing acknowledged by the party or parties, in the Court of the county or corporation where he, she or they resided; and also prove to the satisfaction of the General Assembly, that such slave or slaves have done and performed some meritorious act, for the benefit of such owner or owners, or some distinguished service for the benefit of the State; and such last will and testament, or other instrument in writing, shall not have validity, until the same shall be sanctioned by an act of the General Assembly, nor until the owner or owners shall have complied with

the conditions, which may be specified in such act: and provided also, in all such cases of emancipation by any last will and testament, the widow shall be entitled to her right of dower in the slave or slaves, whereof, &c.—(See title Dower, *post.*)—How. & H. ch. 11, sec. 47, p. 166.

In the case of Luckey et al. *vs.* Dykes, 2 S. & M. 60, and Hinds *vs.* Brazeale, 2 How. 837, decided by the Supreme Court of Mississippi, the construction of this statute came in question. The latter case was as follows:

B. carried a negro woman and her son John to Ohio, *for the purpose* of emancipating them and *bringing them back*. He accordingly executed a deed of emancipation while in Ohio, and returned with the negroes to this State.

By his will B. recited the deed of emancipation and devised his property to the said John, acknowledging him to be his son—it was *held*, that the act of emancipation depended on the laws of this State, and being *in fraud* of such law, was *void*. See also 2 N. Car. Law Repository, 557; 8 Peters, 285; 2 Wheat. 148; 8 Peters, 50.

In the case of Ross' will, the testator directed, that his slaves should be sent by his executors to Liberia, *there to remain free*, and the Supreme Court held this to be a valid devise. Ross *vs.* Vertner—5 How. 305. As it is not against the policy of the State of Mississippi, for the owner of slaves to send them out of the State for emancipation, he may direct it to be done by will. *Ibid.*

The reason of the distinction between the foregoing cases, is, that in the former case, the attempted emancipation was intended to take effect, ultimately, within this State, producing the very evil it was the object of the statute to prevent. In the latter case, the act of emancipation was intended to take effect abroad. In the words of the Court—"If the will in this case provided for the manumission of the slaves in this State, it would unquestionably be opposed to the principles of the statute, and could not be enforced. It would frustrate the policy of the statute, which is opposed to an augmentation of free negroes in this State—a result hazardous to the safety of the owners of slaves, and the security of public peace." But "the act of transporting the slaves to Afri-

ca, *there to remain free*, does not seem to be an act of manumission within the meaning of the statute, or its spirit or policy. No question has been made of the power of the testator to carry his slaves to Africa in his life-time. The power to have done so, resulted to him as owner of the slaves from his acknowledged right of absolute dominion. Having this power himself, it was certainly competent for him to employ another to do the same thing, or to direct it to be done by his executors, who are trustees to carry his intentions into effect." See also cases cited, 2 Call, 319, 357; 8 Louis' Rep. 475; 11 ib. 499; ib. 410; 6 Yerg. 119; 7 ib. 552; and 2 Hill's (S. C.) Ch. R. 305.—a case analagous to the case of *Ross vs. Vertner*. See also the elaborate opinion of Chancellor Buckner, in 1 Freeman's Ch. R. 597—affirmed in case of *Ross vs. Vertner*, above cited.

In the case of *Shattuck vs. Young*—1 S. & M. 30—B. by will, directed that her executor should represent to the Legislature the meritorious services of her negro slave, and should procure from the Legislature an act for his emancipation, and should take charge of the slave and give him the benefit of his own labor, until he should procure the passage of the act—*Held*, that the testatrix did not thereby profess to emancipate the slave, and that clause of the will was not void. The Court said—"This clause does not propose to emancipate, but only to lay the foundation for a legal emancipation by an act of the Legislature. It is competent for the Legislature so to emancipate, and there is, therefore, nothing in the bequest which would authorize us to declare it void; but it would be defeated by the refusal of the Legislature to pass the act. As it was discretionary with the Legislature to emancipate or not, on a sufficient showing, the executor was entitled to a reasonable time to make the application, and the right of the residuary legatee would necessarily be postponed until the will of the Legislature could be known. That portion of the will which authorized the executor to take charge of the negro and give him the benefit of his labor, cannot be construed as a perpetual trust, even if it would have been competent for the testatrix to have created such a trust, with the view of the continuation of the negro in this State. It was at most a trust for a limited time, its duration

being limited by the determination of the Legislature; as it was for the purpose of procuring the act, and until it should be done, that the executor was invested with the power."

In such case should the Legislature refuse to pass the act of emancipation, the slave would fall into the residuum. *Ibid.*

By act of 1842, ch. 4, sec. 2, it is now provided, that *in all cases*, where a slave, emancipated without this State, shall afterwards be found in this State, such slave shall forfeit the protection of the person emancipating him, and be subject to be proceeded against as a free negro—provided such emancipation occurred after 1842. And by sec. 10th of same act, it is provided, "that, hereafter, it shall not be lawful for any person, by last will or testament, to make any devise or bequest of any slave or slaves for the purpose of emancipation, or to direct any slave or slaves to be removed from this State for the purpose of emancipation elsewhere. And in all cases of wills heretofore made and admitted to probate within this State, whereby any slaves have been directed to be removed from this State for the purpose of emancipation elsewhere, or whereby any slave or slaves have been devised or bequeathed in secret trust for such purpose—unless such slaves shall be removed from the State within *one* year after the passage of this act, it shall not be lawful for the executor or executors of such last will and testament, or the person or persons having possession of such slave or slaves, under the provisions of such will, so to remove such slave or slaves; but the same shall descend to be distributed among the heirs-at-law of such testator, or be otherwise disposed of according to law, in the same manner as if such testator died intestate: *Provided*, however, that if such executor or other person having such possession, shall be prevented or restrained within the said term of *one* year, from such removal, by injunction or other legal process, or otherwise, the time during which such restraint shall continue or exist, shall not be taken or computed as any part of said time of one year;—and *provided* further, it shall be competent for any person or persons being the owner of any slave or slaves, to direct his, her or their executor or executors, to emancipate any such slave or slaves for meritorious services, rendered to his, her or their owner or owners, upon such conditions as shall be prescribed by the Legislature of

the State, to which such last will and testament shall be referred for approval before any such devise, bequest, or direction, shall be carried into effect." *Act of February 26, 1842.*

§ 17. A devise to a slave is void, because a slave is incapable of taking or holding property. 2 S. & M. 30.

A will may also become inoperative by the refusal of the devisee to claim the devise. This disclaimer must be by some unequivocal act. Whether a verbal or written renunciation is requisite, has been disputed. Judge Kent, thinks the case would be governed by circumstances. 3 Lomax, 117, citing 3 B. & A. 31; 6 Barn. & Cress, 112; 2 Prest. Abstr. 227-28.

§ 18. A will may be also rendered void by fraud or imposition practised on the testator, or by his insanity. 3 Lomax, 110; 1 Story's Eq. 412, 194.

CHAPTER XXIV.

CHARGE ON REAL ESTATE.

§ 1. Many words which in a deed do not constitute a condition, make a condition in a will—As, if lands be devised to one *to pay* \$100 to J. S.—or paying \$50 to J. N.—this amounts to a condition. 1 Bac. abr. Tit. Condition, B.; 3 Peter's U. S. R. 346; 3 T. R. 41.

§ 2. A will charging land must have the same solemnities as a will devising lands. 14 Mass. 421.

Whenever a testator expresses an intention that all his debts shall be paid, or devises all his property subject to the payment of debts, these words both in law and equity, operate to charge his real estate with his debts. 3 Lomax, 264; 2 John. Ch. R. 614.

As, if testator direct all his debts to be paid, and devise *all* his property to A. B.—Prec. Ch. 264, 430; 2 Munf. 453—or, if a man devise as follows:—"As to all my worldly estate, my debts being

first satisfied, I devise the same as follows"—the land would be charged, though the word *first* had been omitted. 2 Vern. 690; 3 P. Wms. 91. A direction that testator's grand-children shall be raised and educated, raises a charge on the estate during minority—1 N. Car. R. 399—or where a sale is necessary to effect the testator's object. 23 Pick. 163. See also 3 Ves. 738, 545; 6 Call. 308; 1 Leigh, 465; 6 Munf. 163; 11 Ves. 186; 1 Mad. 474.

And the charge is not restricted by the subsequent selection of part of his estate to be sold for the purpose of paying the debts and legacies. Gilm. 174; 3 Lomax, 266, citing 4 Bac. ab. 285, 6; 2 Ves. 568. But in England, the estate so selected must be first subjected—8 Ves. 295—where also there is a general charge on testator's land, and devise of a particular estate to any person, the devisee takes subject to the charge, *only* if the residuum be insufficient. *Ibid.*

A clause directing payment of all the testator's debts, is not alone sufficient to charge real estate, *specifically* devised; for there the intention must be clearly expressed. 2 Ves. 328; Kirby's Conn. R. 284; 9 Pick. 561. Evidence *de-hors* is not admissible to prove an intention to exclude aid of personal estate. 6 Cowen, 333.

And to charge real estate even against the residuary legatee, a clear intention of the testator must be manifest from the will, that devisee shall take subject to such legacy. 10 Wheat. 204; 8 Conn. 1; 2 John. Ch. R. 614. And if, after the date of his will, the testator convert personal into real estate, so as not to leave personalty sufficient to pay debts and legacies, the real estate is not chargeable with such legacies. *Ibid.* But if a charge is made in favor of debts and legacies in the same clause, both are to be paid in the same way. 1 Mer. 233; & see 17 Ves. 468; 1 Leigh, 477.

§ 3. But if the general prefatory words or general expressions are qualified—as, "I direct all my just debts, &c. to be paid by my executors," and the real estate is specifically devised, the debts will not be charged. 2 P. Wms. 187; 5 Ves. 359; 7 ib. 209; 3 Russ. 108, cited in 3 Lomax, 265; 2 John. Ch. R. 614.

And a general charge may be so explained as to subject only a part of the real estate and not the whole. 2 Ves. 313.

Yet notwithstanding it is against the policy of the law to charge real estate by construction, and thus fetter the disposition of real

estate, where the language of the testator admits of a different interpretation; yet the testator's intention is the cardinal rule, and if not contrary to some positive rule of law, must prevail. 11 Conn. 144; 6 Rand. 589; 1 Atk. 383.

§ 4. Personal estate is the first fund liable to the payment of debts, and where the testator's intention appears to be to *exempt* it and provide for the payment of debts by a sale of real estate, and not merely by a charge on real estate, the proceeds of such real estate should be so applied. 18 Pick. 285. Where the testator directed his executor to sell lands, and from the proceeds, after paying all demands, &c. to pay, &c., the lands being worth \$3,000, and there being personal property of about \$7,000, and debts amounting to \$6,000—*held*, there was no intention to postpone the application of the personal property to the payment of the debts as usual, but only that the proceeds of the real estate should not be distributed till payment of all demands. 23 Pick. 163.

§ 5. If testator bequeath land and negroes and other personal property, all specifically described to his wife, and similar property specifically described to his nephew—and these devises compose the *entire* estate—and he then bequeaths to his niece \$700 to be raised out of the estate—*Held*, this *general* legacy to niece does not yield to the *specific* ones, but is a proportionate charge on them both. 4 Dana, 549.

§ 6. The question, in every case, should be, "whether according to the *true intent and meaning* of the *will*, collected from the settled principles of the Courts of Chancery, and the rules of law, the personal estate of the testator is to be considered *exempt* from the payment of his debts." The rule is, "The *intention* of the testator to exempt must be manifested in such a manner, as that persons, out of Court, on reading his will, cannot fail to agree that such was his intention. * * *

"On comparison of all the cases, there are scarcely *two* in which the Courts agree. I can find no rule agreed on but one, that, as express words are not necessary to exempt the personal estate, there must be in the will, that which amounts to *evident demonstration*, or *plain intention*, or *necessary implication*, to operate that exemption. The Judge must in every case, look at the *whole*

will, and then ask himself whether he is *convinced* that it was the testator's intention to exempt his personal estate. Many rules are clear and positive, and it is certain, that it is *not* enough for the testator, to *leave charged his real estate* with, or in any manner bind it to the payment of his debts, but the *personal estate must be discharged*. It must therefore appear sufficiently to every *Judicial* mind, that the testator meant not merely to *charge the real estate*, but to charge it as to exempt the personal. 1 Mer.218, 230; 6 Cowen, 333. (See sec. 2.)*

§ 7. A *bona fide* purchaser of land charged generally with the payment of debts and legacies, is not bound to see to the application of the proceeds—13 Pick. 393; 2 Dana, 84—unless there be a specific appropriation of the purchase money. *Ib.* 6 Ohio, 115.

A testator devised real estate to a trustee and heirs to invest and re-invest the same from time to time, in stocks; and to pay over the income thereof and \$200 of the principal, *annually*, to his daughter—*Held*, the trustee had power to sell the real estate, and the trust did not attach to the land in the hands of purchasers. 20 Pick. 25.

§ 8. In cases of "rents and profits," or money received by trustees, the legatees and creditors must look to such rents, &c. and not further charge the land, 1 Mad. 186. (See sec. 9.)

But where a testator gives his daughter a legacy, charged on real estate devised to his wife, the executrix, she is liable as devisee, and not as executrix, and the remedy is in Chancery. 4 Dana, 69.

§ 9. And a Court of Chancery will direct the sale of lands, where the rents and profits are insufficient—6 Mad. 485; 6 John. Ch. 70—unless the trust be plainly created, for payment by perception of rents or by mortgages. 1 Mad. 186.†

* A tract of land was devised to J. D. "free and clear of any incumbrance, except as hereinafter mentioned, with a limitation over "in case devisee die without issue," and with directions that "in consideration of the devise, J. D. should pay at different periods certain sums to different persons."—*Held*, J. D. is only personally liable for the sums appointed to be paid in his life-time, and that the amount falling due after his death, is a charge only upon the land devised. 3 Ohio R. 165.

† A widow, devisee for life or widowhood, on condition of maintaining and educating children, is not accountable to remainder-men, for what she consumed, in support of herself and children, while a widow. 4 Dana, 69.

Devise to testator's son H. C. of all estate real and personal, subject to the following bequests—one to B. C. of \$1000, to be paid to her at the age of 18, "in land at such place as my son Henry can buy," does not contain a charge on real estate of devisor's in hands of purchasers from the devisee. 6 Ohio, 115.

But where the conveyance of the legal estate had been made to P. by the vendors, and the property was afterwards sold at sheriffs' sale under judgments recovered against him, notice having been previously given to the purchaser at such sale by an uncle of one of the daughters, who was also a rateable inhabitant of the township in which the daughters were settled, and by another rateable inhabitant of the same township, of the existence of the charge—*Held*, the purchaser had notice, and took the land subject to the charge. 1 R. 386.

§ 10. It is the law of Pennsylvania, that when the real and personal estate are blended in the same devise, the land is charged with the payment of legacies. 1 P. R. 111, 112; 6 Binn. 395.

But the lands *descended* are first liable, and next the land devised. 13 S. & R. 348; 3 Yeates, 294; 2 Binn. appendix, 525; 2 D. 131.

§ 11. To make a legacy a continuing lien on the lands devised so as to follow the lands into the hands of a purchaser, it must appear expressly or by direct implication that such was the testator's design. 8 W. 198; 9 W. 529.

A testator devised his lands to his three children, charged with certain legacies. The devisees made partition of the land among themselves—*Held*, the legacies ceased to be a *lien* on the respective shares for more than the proportion of each—2 P. R. 279—especially when the share of one devisee was sold under a judgment against him. *Ibid.* Though, *perhaps*, if one share proved inadequate to the *due proportion*, the others might be liable. *Ibid.* See 9 W. 234, 529; 6 W. 167, 238.

CHAPTER XXV.

TRUSTS CREATED BY DEVISE.

§ 1. Intimately connected with the subject of "Charge on real estate," is that of "Trusts created by devise."

A trust may, like a charge, be either express or implied. It may be created by express words, or by words importing an intention to create a trust. Comst. Digst. citing 2 Finch, 358.

The words, "I devise, request," or, "it is my dying request," may be sufficient, unless there be plain words or necessary implication to the contrary. *Ibid.* A testator may direct his land to be sold and converted into money for more convenient distribution among his heirs, and may appoint a trustee for that purpose.—Comst. Dig. 166.

Any understanding by the executor or assignee that the thing given, is to be held in trust, is sufficient. 1 Vernon, 296. Thus, where goods of a decedent come into the hands of any one, who declares that he holds the property in trust for the children of the decedent, the children *may*, if *all* the debts of the decedent are paid, maintain a joint action against such person for money had and received, without taking out letters of administration. 14 S. & R. 105. But if such person wasted it, children can in this form of action recover only what he received. *Ibid.*

So, real estate purchased by a guardian with funds of his wards, will be treated as a trust for the use of the wards, though conveyed by the guardian to one only. 17 S. & R. 144.

§ 2. The *thing* given must be certain, and the *object* in trust, certain.

The *thing* is certain, where the whole property must remain entire during the life of the first donee; and it is uncertain where any power resides in the first donee to diminish the amount.—Comst. Dig. citing 2 Swift, 107; 2 Ves. 333, 529; 3 ib. 529.

If the testator's intention cannot be literally complied with, the Courts will direct what is consistent with his *general* intent. 2 Ves. 387; 3 ib. 141.

Whether a legacy is given absolutely depending on the good will and friendship of the legatee to deal with it as the testator recommends, or conditional and coupled with a trust, depends on this: If it was intended he should have it entirely within his own power and discretion to make the application or not, it is absolutely given; but, if *on the face of the will*, there is a plain declaration that he is to take it in trust, though the trust be not declared, or be ineffectually declared, or become incapable of taking effect, the legatee will be trustee for those who would take either under the will or at law. 2 Hill's Ch. R. 398.

In case of a charitable bequest, if the object of the trust be not sufficient to exhaust the fund, the Courts will increase the allowance even against the heir claiming the surplus—4 Ves. 11—but not where there is one of benevolence or liberality only. 9 ib. 399.*

§ 3. The trust fund does not descend to the representative of the trustee, but, as long as distinguishable, it enures to the benefit of the *cestuy que trust*.

And, though, in general, money cannot be pursued, yet, if given to be laid out in land to be settled to certain uses, and the donee afterwards purchases an estate, which he does not settle, but by writing owns that it was made with the trust money, this is a sufficient declaration of the trust to bind the land. 2 P. Wms. 414.

§ 4. All persons coming into possession of trust property are bound by the trust. A trust cannot be impaired by the voluntary act of the trustee. A purchaser with notice of the trust will hold the property subject to it, notwithstanding he may have paid a consideration for it. Comst. Dig. 224.

And, therefore, where A. conveyed real estate upon certain trusts, with power to sell and convey, and the trustees afterwards re-conveyed to the grantor, intending thereby to annul the trusts,

*Where property real and personal was devised in trust, the rents and issues thereof to be paid to the *cestuy que trust*, and part of the real estate was taken for a road, and the damages therefor paid to the trustee—*Held*, such damages were *not income*, &c. to be paid to the *cest. que trust*, but a substantial capital, the *interest* on which alone was payable to him. 1 Metcalf, 75. See also, 14 Pick. 108; 15 Pick. 471.

—*held*, he took thereby the legal interest subject to the trusts, and a re-conveyance by him to trustees revived the power of sale.— 20 Pick. 174.

But there is an exception to this rule in the case of a disseizor, who does not hold in privity to the estate to which the trust is annexed. Comst. Dig. 224.

And where a devise of real estate was made to a trustee, his heirs and representatives in trust, to invest and re-invest the same from time to time in safe stock, and to pay the income thereof, with \$200 annually, of the principal, to the testator's daughter, during her life, and after her decease to pay and transfer the whole to her children, the trustee may sell the real estate discharged of the trust. 20 Pick. 25.

§ 5. Where lands are devised for a particular purpose, what remains after satisfying such purpose, will result to the heirs-at-law. 1 P. Wms. 390. So, if in such case, the residue had been made over to A. B. for life, on the death of A. B. it will result to the donor's heirs-at-law. 2 Bro. Ch. Cas. 589. So, if by accident or otherwise, the particular trust is defeated, a trust will result in favor of the heirs. 3 P. Wms. 20.

But a distinction exists between cases, where the whole legal interest is given for the purpose of satisfying the trust expressed, and the execution of the trust does not exhaust the whole;—and cases, where the legal interest is given for a particular purpose, to give to the devisee of the particular estate the beneficial interest. In the *former* case, the residue results to the heir; in the *latter*, it will go to the devisee. 2 P. Wms. 20; 1 Ves. & Be. 272.

And if there be an absolute devise of the property without request or direction, as to a further disposition of it, no trust can result to the heir. Comst. Dig. 224.

§ 6. The first general rule, governing the accountability of trustees is, that they shall not make profits to themselves, out of the trust estate; and this rule makes them accountable for all the interest actually made and received by them. But as it was always difficult to ascertain the actual amount—sometimes impracticable—the rule has been adopted of charging them only with interest on actual balances, and the funds received during the current

year as considered unproductive till the close of it. 2 Hill's Ch. R. 560.

Where an administrator rendered an erroneous account of assets, and paid the creditors their proportion thereof, and took their assignment for the balance—*Held*, he should be considered as holding the funds afterwards collected, *as trustee*—the assignment should be set aside and errors corrected, and executor or administrator ordered to account. 2 Hill's Ch. R. 467.

A guardian or *quasi* trustee, who purchases up claims against his ward, or *cestuy que trust*, should only be reimbursed his actual outlay and interest. 5 B. Monroe, 368.

CHAPTER XXVI.

POWERS CREATED BY DEVISE.

§ 1. General intention must govern the construction of the instrument creating a power. 6 John. 73. The end and design of the testator must be carried out; and no particular form of words is necessary to create a power. 10 John. R. 94; Sugd. on Pow. 172.

Powers must be equitably construed in a court of law. 11 John. 169. It is sufficient to carry out the *substantial* interest of the testator. 11 John. 169; 15 ib. 346; 7 John. Ch. R. 25; 2 John. R. 1.

To support such intention, a power *general* in its terms, has been reduced to a *particular* purpose, *et vice versa*. 7 John. Ch. R. 25.

A mere naked power, not coupled with an interest, is not confined to the strict import of the words in their legal sense, but must be construed according to the testator's intent. 2 Cowen, 195. A *naked* power is a mere power to sell, not coupled with any in-

tent, and ceases on the death of the devisee. 3 Day, 388; Cox, 432; 3 Cowen, 651. It is also revocable: 6 Conn. 559; 1 Chance on Pow. London ed. 131.

A power is *coupled with an interest*, where the person clothed with it must devise a *present* or future interest in the subject itself, over which the power is to be exercised, and not merely in that which is produced by the exercise of the power: 6 Conn. R. 559; 14 John. R. 391, 527. And such power is irrevocable: 6 Conn. R. 559.

§ 2. A man may be invested by a single instrument with a power coupled with an interest as to one estate, and a naked power as to another estate on the same land—as, where there is a particular estate with an interest, and remainder over to third person: 3 Hill's R. 361. And in such case, a sale by the particular tenant is null against the remainder-man. *Ibid.*

§ 3. A power may be appendant, or where the donee of the power has an estate in the land, and the estate to be created by the power, may take effect in possession, during the continuance of the estate to which it is annexed; or it may be in gross—as, where such estate will not take effect, till after the determination of the estate to which it is annexed. 2 Cowen, 195.

A power to sell includes all powers necessary to its performance. These must be such as are most usual and proper, among discreet men in similar cases, of which the Court must judge.—7 John. Ch. R. 25; 1 J. J. Marsh. 289; 2 Wend. 34; 12 ib. 663–4.

So, a power to mortgage includes a power to sell in default of payment by the mortgagor. 7 Ch. R. 22, 25.

If the power be exceeded, a recital of it in the deed does not cure the error. 3 Hill, 367.

§ 4. But a power to sell land and invest money, &c. authorizes the administrator to sell for *cash* only—and a debt of testator to purchaser cannot be taken in payment—1 Hill, 111; 3 ib. 361, 373—unless there be something in the power itself, or in the usage of trade varying this construction. 3 Hill, 373.

An executor cannot pledge the estate of his testator for a loan of money, nor create any lien on it; and if the will empowers him to raise money on the credit of the estate through *banks*, he cannot raise it through private individuals: 1 Freem. Ch. R. 42;

1 Powell on Mortg. 61; 3 ib. 1033; 2 Chance on Pow. 388. The words "issues and profits" do not alter the rule. *Ibid.*

In general, a power to sell confers no authority to mortgage—3 Hill's R. 361; 1 Sugd. on Pow. 538.

A power in a will to sell such property as may be useless, will not authorize the executor to sell any property he may choose—2 M'Cord's Ch. R. 393.

When the power is to sell, and something over is added showing that the power to sell is not to be taken in its primary sense, but means a power to mortgage, the donee may act accordingly. There is a substantial difference between raising money by mortgage and sale, and a power to raise it by one of these means, negatives the other. 3 Hill, 367-8.

And even if the power be to raise money by sale and by rents and profits, proceeds to be invested and otherwise applied to the uses of the will, the donee cannot mortgage even to secure a small sum borrowed by him for the use of the estate. 3 Hill, 370.

Under a power to sell, part may be sold at one time and part at another. 2 Burrows, 1136.

A. devised one half of his real estate, to his wife for her life, with permission to sell with consent of his executors, so much of the *real* estate as might be sufficient to render her comfortable, with remainder of his real estate to his children—*Held*, that a conveyance of the widow was valid, for that the power extended over the whole estate. 16 Mass. 186. But if the devise had been of the income of the estate with power to sell, if the income proved insufficient, a sale of the land would be invalid, unless the income was insufficient. 14 ib. 495.

If a testator devise an estate to A. in trust, to receive the rents and profits thereof, and to divide the same among his children, and authorize A. to join another trustee with him, or substitute another in his stead, and also desires the trustee to relinquish the trust if his children should request him in writing, and authorized the Judge of Probate in such case to appoint a trustee, also empowered trustee to sell real estate or part of it, when recommended by a majority of his children, and A. died without nominating, and Probate Judge appointed B. trustee under the will,—*held*, that the power to sell created by the will was coupled

with a trust which required the execution of the power, and that B. had the authority to sell, that the will conferred on A. 2 Metcalf, 243.

§ 5. If a testator directs a sale of his real estate without declaring by whom the sale shall be made, the executor, if the fund be distributable by him, shall have the power *by implication*—Sugd. on Pow. 172; 2 S. & R. 238; 4 Madd. 44—unless it plainly appear that the testator did not intend that his executor should exercise such power. 10 John. R. 94.

So, a power to sell or mortgage under like circumstances, will by implication, vest in the executor. Sugd. on Pow. 172. But see 2d Desaus. Ch. R. 250, 246; & 2 John. 252.

In Mississippi, the statute declares, that “the sale and conveyance of land devised to be sold, shall be made by the executors, or by such of them as shall undertake the execution of the will, if *no other person be thereby appointed* for that purpose, or, *if the person*, so appointed, shall *refuse* to perform the trust, or *die* before he shall have completed it—but if none of the executors named in such will shall qualify, or after they have qualified, shall die before the sale and conveyance of such lands, then, in these cases, the sale and conveyance thereof shall be made by such person or persons to whom administration of the testator’s estate with will annexed, shall be granted.” How. & H. ch. 36, sec. 90, p. 413.

Further—If there be more than one executor, administrator or collector, named in the letters, any one or more of them, on neglect of the rest, may return an inventory, &c.; and the one so neglecting shall not thereafter interfere with the administration, or have any power over the *personal* estate of the deceased. But the executor, so returning, shall thereafter have the *whole* administration, unless within *two* months after such return, the delinquent or delinquents shall assign to the Court some reasonable excuse, which it shall deem satisfactory. H. & H. sec. 65, p. 403.

§ 6. The probate of a will is not necessary to the due execution of a power created by it, and the execution of the power will so relate to the instrument creating it, that a purchaser of land under the power, will hold by virtue both of the power and the will creating it. 7 John. Ch. R. 45, 48.

Therefore, a power to a mortgagee to sell land, may be executed by an administrator of the mortgagee residing in another State—for the authority is derived from the mortgage, and not from the Court. *Ibid.* (But see statute *ante*, sec. 5.)

The doctrine, that a deed executing a power generally relates back to the instrument creating the power, is a fiction for the advancement of right, and is not to be applied to the injury of a stranger by defeating his lawful intervening rights. 20 John. R. 537.

§ 7. A power to *two* executors to *sell* and dispose of an estate, in such manner as *they* shall judge most beneficial to the devisees, shall not give *one* of them a power to sell, nor authorize *one*, or *both* to enter on and occupy the estate. 3 Day, 384; 2 Pennington, 438. (But see 3 Cowen, 651; 6 John. 73.)

So, if all the executors are living and have qualified, and are capable, all must join. 2 Fonb. Eq. 184; Toller, 485; Co. Litt. 112; 8 Cranch. 9; 2 John. Ch. C. 254.

In Ohio, a power to sell land may be exercised by a single executor. 1 Ohio R. 232. In New-Jersey, if one of two executors refuse or neglect to act, the other may act. 2 Green, 373. If the agreement to sell is signed by one executor, the others may confirm it by act in *pais*, as by delivery. 4 Munf. 332.

§ 8. If a power be given to several executors, and the will does not expressly point to a *joint* exercise of it, a single *surviving* executor may execute. Sugd. on Pow. 166; 3 Binney, 69; 15 John. 348; 1 Caine's C. 16; 14 John. 527; 4 Munf. 332; 4 Har. & M'Hen. 485.

A mere authority to sell, if it be "for payment of debts," may be executed by a surviving executor. But "this gives an *interest*, for payment of debts is a good consideration," and if they refuse to sell, a court of Equity may compel them. Swinb. part 6, sec. 3; 2 Humph. 365.

So, where the testator "devised his lands to two executors to be sold," and died, and one of the executors died, it was adjudged that the survivor might sell, because this was a trust *coupled with an interest*. *Ibid.*

But a devise "that his executors shall sell," is a mere naked authority without an interest, and in such case if one executor die the other cannot sell alone. For, says Swinburne, "an *authority*

must be strictly pursued, which cannot be done in this case, because the testator appointed *two* to sell, and one of the two having died, the authority and trust given to both *jointly* was thereby determined. *Ibid.* See also 2 Dana, 80; 9 ib. 102; 2 Humph. 367* So of a trust dependant on a power. 14 John. 527.

So, the words, "I empower my executors to sell my real estate," were adjudged to create a *naked* power, and the executor cannot maintain ejectment. 8 Yerg. 18.

And although a will directing executors to sell land for benefit of creditors, or to do any act in which third persons are concerned, and who have a right to call on the executors to execute the power, confers an *interest*—2 Humph. 365—Yet, it seems an authority to sell lands, *if it becomes necessary* and advisable to do so, confers no interest nor title in the land. 8 Yerg. 121.

If a testator direct his executors, or any two of them, to sell all his estate both real and personal whatsoever, and direct the proceeds to be equally divided among his children, and appointed his wife, son-in-law, and two of his children executors, *all* of whom had *interests*—*Held*, the power would survive. 16 John. 167.—See also as to powers that survive, 10 Peters, 532; 2 John. Ch. R. 1, 19, 20; 14 John. 527; 3 Binney, 69.

A positive direction in a will to sell, coupled with a direction that the executors shall lay out the proceeds to the best advantage for the children, does not change it, nor render the *sale discretionary* with the executor, though part of them who accept the trust, may make the sale, while the concurrence of *all* might be required to distribute the proceeds. 2 Dana, 81.

Where a devise was to wife for life, then to testator's son in tail, and if he died without issue, then the land should be sold by his executors—*Held*, executors had only a naked power to sell, and if one died, the power did not survive. Swinb. part 6, sec. 3, (7.) See also 2 Penn. 238.

*Where the power depends on the *discretion* of the nominees, the act of 1799 (Ky. laws,) does not apply. 2 Dana, 80; 9 Dana, 102. If the legal title be in one of the heirs, the executor may sell the equitable title so as to enable the purchaser to sue for the legal. 9 Dana, 102.

§ 9. Where executors are authorized to sell lands, and one or more neglect or refuse to qualify, a sale by the residue who do qualify, is good—14 Wend. 90; 2 Paige, 195—even during the executor's life—2 Green, 373; 3 Dana, 195—(But see 3 Day, 384.) In Pennsylvania, one administrator may release or dispose of the estate without the other. 4 Wash. Ct. R. 186—See stat. of Miss. *ante*, sec. 5.

Where testator directed that T. S. and E. G. should *sell his lands*, and made them executors and died—if *they* refuse the executorship, they may sell the lands, because they are appointed by their proper names so to do. But, if they had not been named by their proper names, the sale had been good;—for, where A. devised to *his sons-in-law*, to sell his lands, without *naming* them, and afterwards one of them died—*held*, the survivor could sell. So, where the devise was to four persons (naming them,) to the intent that they sell the testator's lands, and the testator made them all joint executors and died, then one of them refused—*Held*, the rest might sell. This was a doubt at Common law, because it was a *trust* reposed in *all* of them by the testator himself: but if instead of refusing one of them had died, then the survivor might sell, because "*actus Dei nemini nocet.*" Swinb. part 6, sec. 3, (5.) See also 1 Ohio R. 232; 2 Humph. 367; 2 Murphy, 84.

But where executors are directed by will to sell and convey real estate, "any two or more to act," this is not a *personal* trust. One, therefore, who does not qualify, cannot act with one who does, in selling under the will. 1 B. Monroe.

The foregoing rule laid down by Swinburne is more intelligibly stated, in the following decision, reported 2 Dana, 79.

"A power given to a plurality of persons cannot be exercised by part of them, and this rule the Common law, before the statute of Henry 8th, applied to executors. When the power was given to them *by their proper names*, a *mere power* was given to them as individuals and not as executors. When conferred on the executors merely *as such*, as where it is coupled with an interest, or with an express trust consequent on the primary power (though given to the executors *nominatim*,) it is to be considered as conferred on them in their *fiduciary capacity collectively*, and it sur-

vives as long as *more than one* remains, but *not* to a *single* one. *Ibid.* 78, 79.*

A power to executors, or a *major part* of them, vests in the last survivor and his representatives. 2 John. Ch. R. 1; 14 John. R. 527.

§ 10. A testator directed executors to sell lands, and executors sold accordingly—it was *held*, that the will being lost, the executors might go into Chancery, to have trespassers removed to enable them to make title to the purchasers. 3 Humph. 247.

Where a testator directed his real estate to be sold, and the proceeds to be distributed among the children in certain proportions, it was *held*, that a mortgage by one of the legatees, did not create any lien on the land. 3 W. 289.

In what cases Equity will support a power, see 2 Lomax, 175, 183.

Though Equity will supply a defect in the execution of a power, a right cannot therefore be set up under it at law. 8 Cowen, 526.

A. having a house and lot in town, and also *two* tracts of land, devised that his executors should sell *one* of the tracts of land, and his house and lot, to pay his debts, and that the widow should have the other tract during her life; and at her death, it should be sold, and the proceeds divided among his children, *then living*. The executors sold *one* of the tracts, but *not* the house and lot, and, (one of them dying,) the survivors sold part of the other tract, —*Held*, the last sale was void; the power having been *extinguished* by selling *one* tract for the payment of debts, the other being reserved. 2 Murphy, 125.

A power becomes extinct by *complete* execution, but not by a partial one—2 Lomax, 183—except *pro tanto*.—*Ibid.* 184. If defectively executed, it may be executed over again. *Ib.* 183.

Where there is a complete execution of a power, and something *ex abundanti* created, which is improper, the execution is good

*A. devised his real and personal estate to his wife, and appointed her, with others executrix, and directed sale of realty if personalty prove insufficient, to pay his debts. The wife alone qualifies, the testator in his life-time having disposed of all his personalty—*Held*, only the wife could execute the power to sell the realty. 15 John. 346.

and only the excess void;—otherwise, if there is not a complete execution of the power, or where the boundaries between the excess and the execution are not distinguishable. 3 Wash. C. C. R. 12; 3 S. & R. 108; 6 ib. 211; 9 ib. 166.

If one having only a power to dispose of lands, but no interest in them, make a disposition of them without reference to the power, they shall be considered as passing by virtue of the power;—because, otherwise, the disposition would be inoperative or void. 2 W. 188, 185.

But where a man has a power and interest, and undertakes to convey generally, as owner of the land, without reference to his power, the land shall pass by virtue of his ownership. 8 W. 209.

§ 12. If the power fails, or is defeated, the property will descend to the heirs of the donor. 3 Cowen, 651; 6 John. 73.

CHAPTER XXVII.

LEGACY.

§ 1. A legacy is a bequest of goods and chattels by testament, and confers an *inchoate* property to the legatee, to be perfected by executors' assent;—for the legatee cannot take possession without the assent of the executor—6 Cow. 339—because the executor must satisfy debts before legacies. *Ibid.* But this rule applies only to personal estate. *Ibid.* This is the law of England, and the law is the same here, except that a power is given by statute on the application of the executor to sell lands for payment of debts. *Ibid.*

§ 2. Proper legacies are either general or specific;—and there is an improper kind of legacy termed a donation *causa mortis*.

A bequest of *quantity* of whatever kind, is *general*—as, of a quantity of stock; and if the testator had it not at his death, the executor must procure it for the legatee. A legacy of \$50 for a ring, is a general pecuniary legacy, and personal ornaments given by will, are general legacies. 2 Ves. 562; 3 Atk. 693.

A specific legacy is a gift of a particular thing, as a horse, a cow, &c., and is not to abate in proportion, as a pecuniary legacy must do, in case of an insufficiency of personal assets. Comst. Dig. 187. For a specific devise is not subject to contribution—but a general one is—the remainder after a life-estate as well as the rest, to make up the *third* for the widow who renounces. 5 Dana, 353.

Specific legacies are of two kinds—

1st. Where a particular chattel is distinguished from all others of the same species—as, “the diamond ring presented by me to A.”

2d. Where a chattel of a certain species, without any particular designation of it, is bequeathed, as, “a diamond ring.”

In the first case the legacy can be satisfied only by the delivery of the particular ring; and if not to be found the bequest fails, unless it be in pawn, when the executor must redeem it for the legatee.

But in the latter case, the bequest may be satisfied by the delivery of any thing of the same species.

§ 3. A specific legacy may be of a particular bond, or stock in a particular fund. Comst. 188. As, “of all the money due on the bond of P.” 2 Halst. 68.

It may be carved out of a specific chattel—as *part* of a debt due from A.—or *part* of stock in a certain fund. Comst. 188—See also 3 Dess. 47; 2 Cox, 184; 7 John. Ch. 258; 13 S. & R. 348,—for other examples of specific legacies.

A legacy thus—“I order \$500 to be kept in gold or silver money for each of my children, to be paid and given to my *four* children, at lawful age or marriage,—their money cannot be lent or used, but must be paid to each of them, as they come of lawful age as above said, and kept for that purpose”—is not a specific legacy, unless the sums bequeathed are *in specie*, separate and in parcels, identified and described and given to a legatee—3 Harr. 59;

—and the interest therein will go to the general fund of assets. *Ibid.*

§ 4. A legacy in money may sometimes be specific, as a certain sum of money in a particular bag or chest, or in the hands of A. Toller, 301; 2 Black. Com. 512—See sec. 5, *post*.

A testator at the date of his will, owned *sixty* shares of the H. Bank stock, but before his death purchased 36 more. In his will he bequeathed to his wife the whole of his stock in the H. Bank, amounting to \$6,000—and in case he should sell or dispose of it, then \$6,000 in cash—to hold the stock or cash in her own right *forever*—*Held*, this was a *specific* legacy of the sixty shares only—22 Pick. 299.

A devise of “all the money due on a bond against P. & J.” is a *specific* legacy. 2 Halst. 414.

A legacy “in notes to be taken out of my notes and handed over,” &c., is not merely a charge on the notes, but a *specific* legacy of securities to be hereafter ascertained—2 Dev. Eq. 288—but one, to be paid as soon as its amount can be collected, if the legatee is willing to receive the amount in good notes, is a *general* legacy. *Ibid.* So, a legacy “in notes to be paid as soon after my death as it can conveniently be done,” there being nothing to denote that any particular notes were intended. *Ibid.* And a subsequent bequest “of all the notes that will be remaining after paying off the legacies herein before given,” will not make them *specific*, because the remainder being uncertain in amount, a charge on them, and not a fractional part of them, was intended. *Ibid.*

§ 5. The same may be *pecuniary* in one sense and *specific* in another—*specific* as given out of a particular fund, and not out of the estate at large—and *pecuniary* as consisting of definite sums of money, and not amounting to a gift of the fund itself, or any aliquot part of it. (See sec. 4, *ante*.) 2 Cox, 184; 3 Dess. 303; Toller, 300.*

*A bequest of a negro of a particular description, with a direction to the executor to purchase one rather than divide families, is a *pecuniary* one.—1 Dev. Eq. 87. So, words in bequest to wife, “I wish her to get Stanford in her third,” is not a *specific* legacy, but only entitles her to take him at a fair valuation. Dev. & Batt. 360.

A legacy of money is specific only when the money is identified and distinguished from all other money—as money in such a bag, or in such a bond, or out of a particular security, or in such hands. 1 Hayw. 228.

If payable out of a particular fund which fails, it is lost.—1 Hayw. 228. If no fund be named, it is payable out of the residue. *Ibid.*

DONATIONS, *Causa Mortis*.

§ 6. A donation *causa mortis*, is a gift of a personal chattel, made by a person in his last illness, subject to an implied condition, that if the donor recovers, the gift shall be void.—3 Binn. 370. So, it is void if the donee die before the donor.—*Ibid.*

To constitute a good donation *causa mortis*, it is not necessary that the donor should be in such extremity as is requisite to give effect to a nuncupative will. 2 Wh. 17.

Such a gift may be evidenced by a writing not under seal. 2 Wh. 17.

This amphibious species of gift (or legacy,) so far partakes of the nature of a legacy, as to be ambulatory and imperfect during the life of the donor—and it is therefore revocable. 1 P. Wms. 406; 3 Binn. 370. It cannot prevail against creditors.—Comstock, 191.

It differs from a legacy in this, that it does not require the assent or any other act of the executor to perfect the right of the donee. Because, there must be a delivery by the donor, either *actual* or *symbolical*, of the subject intended to be given. A delivery of the mere evidence of the thing to be given in lieu of the thing itself, is not sufficient. Therefore a promissory note cannot be the subject of such a gift, unless it be a *cash* note, as a *bank* note, or bond—3 Binn. 366—(because, the latter is a specialty, but where the distinction between specialties and simple contracts is abolished, this distinction does not exist—Comst. 191; 1 Cowp. 598)—or, a treasury warrant of the government.—2 Ves. 431; 3 P. Wms. 356; 2 Bro. Ch. C. 612; 3 Atk. 214; Pre. Ch. 300; 2 Ves. 111.

The better opinion is, that where delivery is not proved, a *deed* is good evidence of the gift without delivery. 1 Ves. Jun'r. 11; 1 ib. 314.

If a person draws a check, and makes an endorsement on it, necessarily supposing death, this appointment will be considered good, as in the nature of a donation *causa mortis*.—1 P. Wms. 441—As, that the appointee shall buy mourning with it. *Ibid.* 2 Ves. 111.*—Or if testator executes a note—City of New-York, Law Reporter, June, 1846, p. 76—and 1 Paige, 318; 1 Cowen, 598.

§ 7. The making of a will after an alleged donation *causa mortis*, is not conclusive against the donee. 2 Wh. 17. On the 18th Oct. 1832, A. then labouring under a complication of disorders, of which he died on the 1st November following, delivered two watches to B.—On the 22d Oct. 1832, A. executed a paper writing in the form of a will, by which he gave the two watches to B. in whose “possession,” he proceeded, “I myself placed said articles.” On the 29th of October, A. executed a will, by which he gave all his property absolutely to C.—*Held*, that B. was entitled to retain the watches. 2 Wh. 17.

Where a will disposing of all the testator's estate real and personal, was made seven days after an alleged donation *causa mortis*—*Held*, the party claiming under the will, was entitled to recover the chattel from the party claiming it under the donation. 1 M. 90.

CUMULATIVE LEGACIES.

§ 8. Legacies may be cumulative—As, where a testator has *twice* bequeathed a legacy to the *same* person, it becomes a question, whether the legatee shall take both, or only one.

Whether cumulative or not, is a question of intention.

Extrinsic evidence is admissible, as, if after the first legacy, the testator receives a large accession to his estate, another legacy of a like sum in a codicil, may be cumulative. 1 P. Wms. 423.

*Where the testator gives a legacy by his will, and to secure the legatee a preference over the widow, gives his bond to the legatee during his life-time, this is a legacy in disguise. The bond will have no greater effect than legacies. 2 Rand. 508.

Where there are two legacies of the same sum, to the same person, in the same will, the latter is held to be a substitution for the former, and not cumulative, unless there be some evident intention of the testator that they should be so considered;—and it is *with the legatee* to prove such intention, and thereby rebut the legal presumption to the contrary. 10 John. R. 156; 4 Harr. 128. Presumption either way is to be controlled by internal evidence and the circumstances of the case. *Ibid.*

Where the same thing is bequeathed several times, it is necessarily but one and the same legacy. When the *like quantity* is bequeathed by one and the same instrument, it is but one legacy. 10 John. R. 156.

And, if an unconditional legacy is given by a third testamentary paper, it is a substitution for the same amount, given by the first. Comst. 197.

§ 9. If the legacies be of *unequal* quantities in the same instrument, or, if of equal and unequal quantities in *different* instruments, they are not merged in each other, but are cumulative. *Ibid.* And in such case, the presumption, in favor of the legatee, (i. e. that they are cumulative,) must be rebutted by the executor. 10 John. R. 156; 4 Harr. 128.

And where the *same* sums are payable at *several* times, and on *different* contingencies, they are cumulative—So also, where *one* sum is payable on a contingency and the *other not*. 4 Harr. 128.*

Where a bequest was in the following words—"I do give and bequeath unto my two grand-daughters each *four* hundred dollars, to be paid to them by my executors. If they are not of age

*A testator by five several codicils to his will, made *different* bequests in favor of his natural children, which if they had stood alone, would have been cumulative: Then, by a 6th codicil, after referring to and republishing his will, and his 3d codicil by which he had merely revoked the appointment of a trustee, and another codicil, which tho' referred to by a wrong date, was construed to mean his 5th codicil, by which he had made special provision for all his natural children; and after reciting that he had by one or both of said codicils, in a sufficient manner, provided for a natural daughter, therein named, and was desirous of making a similar provision for two other natural daughters, gave to them an estate similar in all respects to that given by his codicil or codicils to his other daughter, and declared they should have the same provision, as he had heretofore made for his other daughter—*Held*, all the daughters were entitled to the legacy contained in the 5th codicil, and no other. *Robbey vs. Robbey*—2 English Cases in Law and Equity, 132.

at my decease, I order my executors to pay out of my estate to Christina, four hundred dollars, one year after my decease, and to Deborah, four hundred dollars, two years after my decease—*Held*, these legacies were cumulative, and *each* girl was entitled to *eight* hundred dollars. 4 Harrison, 128.

LEGACY—ADEMPTION OF.

§ 10. If a testator sell a specific thing devised by him *voluntarily*, it is an ademption of the legacy. Swinb. 524. (See sec. 11, *post*.)

So, if he sell a part of a certain number of shares, bequeathed by him, it is an ademption *pro tanto*. 3 Ves. 310; 6 Pick. 48, 49, 350. A legacy properly specific, is adeemed by any change in its state or form, effected not by fraud or operation of law, but by the act of the testator, whatever be its purpose, which makes the *corpus* of the legacy at his death, a different thing, from what is described. 3 W. 337.

So, the collection of a debt, or disposition of a chattel specifically bequeathed, by the testator in his life-time, is an ademption of a bequest thereof, whatever be the testator's intention. 7 John. Ch. R. 258—(But see 1 Wash. 57)—And see 2 Halst. 414—in which it is decided that when payment is *tendered* to the testator of a debt specifically bequeathed, it is not a circumstance from which to infer an intention to adeem. When he calls in the money himself, it is a circumstance from which such intention may be presumed, unless accounted for on other grounds. And, in the case of a *general* legacy, the intention of the testator is of the essence of ademption. 15 Pick. 133, 135; 6 ib. 48.

Where "all the money due on a bond against P. & J." is bequeathed, and afterwards the testator, at the request of the obligor, accepted another bond in lieu of the first, for his accommodation, it is not an ademption of the legacy. 2 Halst. 414.

A bequest of \$500 to the sister of the testator, after which testator advanced and she receipted for \$466, "in part of her right of dower in his will"—*held*, this was an ademption *pro tanto*. 15 Pick. 133, 135.

Where there was a legacy to testator's daughter, of \$215, to be paid at her marriage, in money, or such articles as she might choose;

and on her marriage he furnished her with \$149 47, which he charged to her; and he afterwards paid \$500, and took her husband's receipt for it as part of her portion; and on the same leaf where charges were made, was found an order of the husband for \$20, paid; and by codicil, afterwards, testator gave his daughter "\$100 in addition to what he had before given her:"—*Held*, this was an ademption *pro tanto*, being coupled with the declaration that he had paid off part of her portion. 14 Pick. 318.

A testator by his will gave certain legacies to his grandchildren, with whom he had always lived on the most intimate terms, and whose advancement in the world had been chiefly at his expense. He subsequently made settlements on the marriage of each of his grandchildren during their father's life. The question was, whether the testator had placed himself *in loco parentis*, towards his grandchildren, so that the legacies were adeemed by the settlement—*Held*, that the settlements could not be taken to be in satisfaction of the legacies. *Pym vs. Lockyer*, 2 Eng. Cas. in law & Eq. 204.

But, where a parent, or person *in loco parentis*, gives a legacy to a child by way of a portion, and afterwards makes advances in the nature of a portion to that child, it will amount to an ademption of the legacy, and a court of Equity will presume that the testator meant to satisfy one with the other. But this doctrine applies only to legacies, and not to a residuary devise of lands. To apply it to lands, would contravene the statute of frauds, which requires Revocation to be equally solemn with the Devise. 2 Eng. cas. of law & Eq. 101—(See also *ante*, sec. 1, p. 61.)

If portions be provided by any means whatsoever, and the parent gives a provision, by will, for a portion, it is, *prima facie*, satisfaction, unless there be circumstances to show it was not so intended. 3 Murph. 98.

§ 11. If a sale of the chattel bequeathed be compulsory, it is not an ademption of the legacy, and the value must come out of the residuum. Swinb. 524; 3 Bacon, 470, 480.

And a legacy of shares in a Bank is not extinguished by a variation of the testator's interest, by operation of law. 7 John. Ch. R. 258—(See sec. 10.)

LEGACY, IN SATISFACTION OF A DEBT.

§ 12. A legacy will be presumed to be a satisfaction of a debt from the testator, where there are no circumstances showing a different intention—1 Green's Ch. R. 1—and where the legacy and debt are equal. 5 Cowen 368.*

This general rule is not favored, and only applies where no presumption to the contrary can be drawn from the face of the will. *Ibid.* Parol evidence is admissible to rebut this presumption—Toll. 337-8—and also to support it. 8 Cowen, 246; 3 Mur. 98; 12 Wend. 352.

If the assets are insufficient, a legacy is always supposed to be in payment of a debt. Tuck. Comm. B. 2, 430.

But if a legacy be *less* than the testator's debt to the legatee, or of specific articles, or, if provision is made for the payment of debts, the legacy will not operate as a payment; and in general, it will not operate as a payment, unless such appear to be the testator's intent. 12 Mass. 391. But a legacy of equal or greater value than a debt from testator to legatee, is *prima facie* a satisfaction of the debt. 1 Dev. Eq. 108; 2 Dev. Eq. 488; 4 Wend. 443.

But where the testator directs the executors to "pay all his just debts," and the legacy is payable when the legatee arrives at age, and the debt is, in a measure, unliquidated, the legacy is no satisfaction of the debt. Tuck. Comm. B. 2, 430; 2 Dev. Eq. 488; 1 Green's Ch. R. 1; 5 Cowen, 368; 2 Hill, 567.

So, a present debt, cannot be satisfied by a contingent legacy. 1 Green's Ch. R. 1.

So, if the legacy be unequal to the debt, or postponed till a future day. 12 Mass. 395, 399; 6 Rand. 176.

So, if a legacy is of date prior to the creation of the debt, or if the debt be an unsettled account, it is no satisfaction—Toll. 337, 338—unless such appear to be the testator's intention. 8 Cowen, 246.

A legacy by a debtor to creditor's wife, is no satisfaction of a debt. 12 Wend. 67.

*The presumption that a legacy was intended for a payment of bond given by testator for certain services, must rest on the fact that the bond was given for the same services. 6 Rand. 176; 12 Mass. 395-7.

Although generally a devise of land is not a satisfaction, or part performance of a debt or agreement to settle *money*, yet if the contract authorizes such a mode of making satisfaction, it will be so decreed, though not stated in the will to be satisfaction. 3 W.C. C.R. 48—See 2 Hill, 576.

§ 13. If B. serve A. under expectation of a testamentary compensation, and A. leaves him a legacy in his will, it is a satisfaction, and B. cannot sue A.'s executors, and take the legacy. 2 Hill, 576; 22 Pick. 480—(and see note to sec. 12, *ante*.)—See 4 D. 123.

But the acceptance of a legacy, *not intended to operate as a satisfaction* of testator's debt, does not amount to an extinguishment of it. The circumstance of the case must be such as to warrant the conclusion, 12 Wend. 349.*

The rule does not apply to next of kin, who is presumed to take under the law and not the will. 1 Dev. & B. 334. And the acceptance of a legacy under a will, will not prevent the legatee from setting up any claim he may have to any property bequeathed to another person, in the same will. 2 Dev. & B. 115.

§ 14. If a creditor makes his debtor his executor, it is a release of the debt, except as against creditors of the testator. Toll. 338.

Where a testator leaves a legacy to his debtor, whose debt is less than the legacy, the legatee is considered as having so much of the assets in his hands as the debt amounts to, and satisfied *pro tanto*;—and where the debt exceeds the legacy, the executors of the testator are entitled to retain the legacy in part discharge of the debt. 12 Wend. 67.

By act of Mississippi, it is enacted, that "*in no case* shall an executor or administrator be allowed to retain for his own claim

*A testator who was indebted to his sons A. & B. in a sum equal to about \$1400, bequeathed to A. some small specific legacies, and one-fourth of the residue of his estate, after certain devises and legacies. The will further declared—"Whereas my son B. is indebted to me in sundry sums advanced for his benefit;—my will is, that all his debts to me be cancelled, and I bequeath to him the sum of \$500, and no more." At the time of testator's death, B. was indebted to him in the sum of \$10,000, and upwards, and he had previously received from the testator a gift of stock, to the value of \$6,000. The testator left real and personal property to the amount of \$255,000.—*Held*, the bequests did not amount to a satisfaction of the debt due by the testator to his sons. 3 S. & R. 54—and see 4 D. 423.

against the deceased, unless the same be passed by the Court of Probates; and every such claim shall stand on an equal footing with other claims of the same nature" How. & H. 411—(Act of 1821.)

Under this act, a debtor cannot, even under the pretext of considering a legacy to himself a satisfaction of his claim against the testator, acquire any preference over other creditors.

And by act of 1821, it is provided further, that "the bare naming of an executor in a will, shall not operate to extinguish any just claim, which the deceased had against him; but it shall be the duty of every such executor, accepting the trust, to give in such claim in the list of debts; and on his failure to give in such claim or any part thereof, any person interested in the administration, may allege the same, by petition to the Probate Court granting the administration, and the said Court with consent of the parties may decide on the same; or it may be referred by the parties, with the approbation of the Court; or at the instance of either party the Court may direct an issue or issues to be tried," &c.—See How. & H. 404, and 1 Howard's R. 68—(and see Inventory, *post*.)

LEGACY, LAPSE OF.

§ 15. For definition of lapsed legacy, and statute of Mississippi, in relation thereto—see *ante*, page 150, sec. 6, citing H. & H. ch. 36, p. 386, act of 1821.

In Massachusetts, it has been decided that "under statute of 1783," providing that "where any child, grand-children, or other relation, having devise of real or personal estate, die before the testator, leaving lineal descendants, such descendants shall take the estate in the same manner, that such devisee would have done, if he had survived the testator"—if the devisee die before the testator, leaving no lineal descendants, a legacy to him lapses. 18 Pick. 41; 7 Mass. 86.

§ 16. Where a devise is to A. and his heirs, or a legacy to A. and his executors, the intention is, A. shall take an interest transmissible at his death to his heirs or representatives; but as this cannot be if he dies before the testator, there will, in that event be no devise or bequest, unless it be plain that the testator *intended* that the heirs or executors should then take, when they take

directly from the testator. 6 Dana, 52. The general rule is this, viz:

Where an estate is devised to one, and in case he dies without issue, then to another, and the first devisee dies in the life-time of the testator, the devise does not lapse, but passes to the second devisee. 1 Dana, 43.

A father devised to his son, one-third of his real estate, and to his three daughters the remaining two-thirds. Two of the daughters died during the life-time of the testator.—*Held*: the land devised to the two deceased daughters, did not lapse, or go to the surviving daughter, but to the son, the surviving daughter and a daughter to whom no land was given by the will,—equally, as heirs of the deceased daughters.—2 Yerg. 341. (Query—would it not be otherwise under the statute of Mississippi?)—or would the same rule prevail under the words “the estate so bequeathed shall vest in such child or descendant, of such legatee, *in the same manner*, as if such legatee had survived the testator, and had died *unmarried* or *intestate*.” Can the “descendant” meant here be “*lineal* descendant” of the deceased legatee, when it is also provided that the legacy shall go, as if he had died “*unmarried*?” If collateral relations, on whom the property might descend are meant, the law under our statute would be the same as the rule established in the foregoing decision, in Tennessee.

In North-Carolina, it is decided, that if A. bequeaths his personal property to his *five* daughters, naming them, “to them and their disposal,” and three of the daughters die in the life-time of the testator, the shares given to those who died are to be distributed among the next kin of the testator, as lapsed legacies, and do not survive to the other two daughters. 1 Murphy, 190, (1808.)

§ 17. Lapsed legacies go to the residuary legatee—and lapsed devises of land, to the heir. 5 Pick. 528, 537, 538.

So, of a devise, void for incapacity of the devisee. *Ibid*. But not if the devisee dies, or becomes incapable *after* making the will. *Ibid*. And see 2d How. 337.

A general gift of the residue includes legacies not effectually disposed of, whether they fail by lapse or illegality, unless the will clearly shows a different intention. 1 Dev. & Batt. Eq. 113.

The general rule is, that lapsed legacies of chattels pass under a general residuary bequest; but this rule does not apply where the residuary bequest is of a *particular* fund, or description of property, or other *certain* residuum. 1 Hill's Ch. R. 97.*

Nor does a lapsed legacy fall into a residue, which is only *partial* in its nature, though it requires very special words to deprive a residue of its *general* character. Where a residue "consisting of crop, stock, and furniture" was given, it was *held*, that a lapsed legacy of a slave did not fall into it, but was subject to distribution under the statute. 1 Dev. & Batt. Eq. 393.

Merely charging the residue with the payment of legacies, will not prevent those which fail for any cause from sinking into it. 1 Dev. & Batt. Eq. 113.

The *ancient* decisions say, in regard to bequests of the residue, that the testator intended to pass only that which was left, after taking out the legacies, and that the executor or next of kin take the *lapsed* legacies. And the *modern* say, that the testator intended his residuary legatees should take all that does not pass under the will—no matter from what cause there may be a residue. Both are founded on the supposed intention of the testator;—neither of them say, that a legatee can take without or contrary to an intent. Therefore, where a testator bequeathed to his nieces, "the residue of his property not disposed of, except his negro woman Jinny," and in a codicil to his will, directed "that his negro woman Milly be left precisely as his negro woman Jinny was left in his will;" and Milly had a child after the death of the testator, this child belongs to the next of kin, and not to his residuary legatees. 3 Murphy, 597.

* A testator bequeathed to his wife *one-half* of his negroes, household furniture, stock, money, debts, &c. and to his sister's children, (*naming* them.) "all the rest of my negroes and their increase;" and adds, "all the rest of my property *not* disposed of, I wish sold at public sale, and the proceeds divided among the said children, and the rest of my money on hand and owing, I wish to be disposed of in the same manner." The testator's wife died in his life-time, so that the legacy to her lapsed.—*Held*: the words, "all the rest of my property," must be understood as exclusive of the negroes, money, and debts due, and as covering only the household furniture, stock, moveables, and chattels of that class of property;—that nothing else of the lapsed legacy but property of this description, passed under the residuary bequest, and the negroes, and money, and debts due, descended to the heirs general. 1 Hill's Ch. R. 98.

A bequest of slaves, with the request that the legatee will permit "said negroes to have the result of their own labours," is a bequest for emancipation, and a trust in them results for the residuary legatee or next of kin. 1 Dev. & Batt. Eq. 113, [1835.]

In Mississippi, it has been decided, that "where the testator made several specific bequests, and also manumitted several slaves contrary to law and the policy of the State, the slaves should go to the residuary legatee, and not to the heir-at-law. 2 How. 337; 2 Sm. & M. 60.

The residuary legatee is entitled to take whatever may by lapse, invalid disposition, or other casualty, fall into the residue after the date of the will. *Ibid.* See also 2 Sm. & M. 30; *ib.* 60.

When it is plain from the language of the will that the *testator intended* to constitute certain persons residuary legatees, not of his estate, but only of proceeds of property directed to be sold, and in part appropriated to other objects, then whatever may by lapse, invalid disposition, &c. fall into the residue after the date of the will, will go to the next of kin. 2 Sm. & M. 60. Or, where the property undisposed of is excepted out of the residuary devise. *Ib.* and 2 Dess. 127.

LEGACY—ABATEMENT OF.

§ 18. If the personal estate undisposed of by legacies be insufficient to pay all the debts, and the expense of settling the estate, then the legacies must abate, as follows:—

1st. The general legacies in equal proportions.*

2d. The specific legacies. [See 1 How. 533.

If however the testator give a specific and pecuniary legacy, and direct the latter to be paid out of all his personal estate, and there be no personal estate except the specific legacies, they shall be subject to the pecuniary legacies, as otherwise the latter would be nugatory. 2 Fonb. 377, 378. So, where he devises all specifically. 1 Dev. Eq. 87, 320. But if the testator does not give away the whole of his property specifically, and what is left afterwards is consumed or destroyed, by the testator, or his executor,

*Legacies for a monument in discharge of a debt of piety, does not abate with the other legacies. 1 P. Wms. 423. So, a legacy to the poor as doles of the funeral. 2 *ib.* 25.

this circumstance will not make the specific legacies abate;—1 Dev. Eq. 320—and to determine whether a specific legacy shall abate, evidence *dehors* respecting the assets, is admissible. *Ibid.*

§ 19. Of general legacies those abate *first* which are payable out of the surplus, being founded in a presumption which proves to be erroneous. 2 P. Wms. 23.

So, as a specific legacy may be carved out of particular chattel, if the chattel prove deficient the legacy will abate; and in case of a deficiency of general assets, specific legacies abate proportionately *inter se*. 2 P. Wms. 382; 1 Hayw. 228.

But, in either case, the liability of the legatee extends only to the legacy in *specie*, and not the *hire*. 2 Hill's Ch. R. 466. But if he do not contribute on demand, he will be liable for interest. 2 Murph. 92.

Where there was a devise to the plaintiff of cash sufficient in the opinion of the executors, not exceeding \$1,000, to purchase a tract of land, and in a following clause, a devise, thus—"I give to my wife all the negroes I obtained in marriage with her, and their increase, also one-third of my stock, &c., and the residue I give to my children by my present wife"—The estate is exhausted, except the negroes contained in the residuary clause to the wife and children, and debts to a large amount remain unpaid.—Plaintiff claims his \$1,000—*Held*, that the plaintiff's legacy is *general*, but still to be paid out of the residuary part devised to the wife and children, which being a residuum can never be specific; that the children's part is to be first applied, as the wife's part, though general and residuary as to the plaintiff, is specific as to them; and that as the testator, in mentioning the sum of one thousand dollars for the plaintiff, contemplated a full enjoyment by the legatees of their respective legacies of slaves; therefore, under the discretionary power given to the executors of fixing the amount to be paid by the plaintiff, the Court will direct, that his legacy shall be abated from \$1,000, in proportion to the value of the negroes, that shall be required to pay the debts. 1 Hayw. 228.

And where testator directed, among other bequests, as follows: "after my debts are paid, it is my will and desire that my stock

of hogs and cattle, my notes and accounts, shall go to U. W.”—*Held*, that the executor properly paid the debts out of the undisposed surplus, and not out of the legacy thus left to U. W. 2 Hayw. 304.

A bequest of “all the notes of hand that will be remaining after paying off all the legacies hereinbefore given, which I suppose will be from twenty to thirty thousand dollars,” is so far specific, that the legacy is to be applied to the payment of the general legacies, only in the event of the undisposed of residue being insufficient for their discharge. 2 Dev. Eq. 488. See also 1 How. 535, in which A. by his will gave to his brother B. three-eighths of all his estate; also gave several pecuniary legacies, and the balance of his effects of every description to be equally divided among testator’s nephews and nieces—no provision was made for payment of debts—*held*, B. is entitled to three-eighths of all the estate after the payment of debts. *Fisk vs. McNeill*.

§ 20. The whole estate of a deceased person being liable to the creditor, if owing to the removal of one or more of the legatees from this State, or any other cause, the estate of the testator in his or their hands, cannot be reached by the creditors here, the other legatees, within the reach of the process of the Court, are liable to the creditor for his whole debt, if their legacies amount to so much; and if one legatee pays more of a testator’s debt than another, it is a question of contribution between him and the other legatees. 1 Murph. 176.

Descended land must exonerate specific legacies from all liability for payment of debts, for which the heir is bound. 2 Dev. Eq. 173.

§ 21. Legatees, in certain instances, are bound to refund rateably to the executor—as, in case of deficiency of assets, for payment of debts.

If the deficiency be only for the payment of legacies, the executors can require legatees to refund where the payment was *compulsory*; but if voluntary, the law presumes admission of a sufficiency of assets, and the other legatees can resort only against him—unless he be insolvent, when equity will aid the legatees against a co-legatee who has been paid.

Even if payment be voluntary, executor may compel the lega-

tee to refund, if the deficiency is created by debts which did not appear at time of payment. 1 Ch. Cas. 135.

And if a legatee obtain a decree for his legacy, the other legatees may compel him to refund, if assets were originally insufficient, and the deficiency not subsequently created by waste of the executor. In the latter case the legatee shall enjoy the fruits of his diligence. 2 Vern. 205.

In order to protect executors and administrators against the consequences of paying legacies before final settlement, the law of Mississippi entitles them to require a refunding bond, conditioned to refund a due proportion of any debts or demands which may afterwards appear against the intestate, and the costs attending the recovery of such debts. How. & H. 406. But this privilege is limited to cases of payment before final settlement.—How. & H. 406.

ASSENT OF EXECUTOR.

§ 22. An executor may assent to a legacy even before probate; 4 Dana, 248—and it may be express or implied, proved directly, or inferred from circumstances—Ib. 303—as if he offer money for the legacy. *Ibid.*

Where the executor himself purchases a legacy from the legatee, the act amounts to an assent;—but this is only where the legatee's share in the thing itself is transferred for value, and not where such transfer is nominal and voluntary, and only of a contingent interest of the legatee while the executor's right continues. 4 Dana, 303. The latter species of transfer is a fact from which assent may or may not be inferred, according to other circumstances. Ib. 305. The amount of consideration is a circumstance to explain the nature of the transfer. Ib. 305. See also 3 Dev. 399; 4 Dev. 257; 1 Dev. & Batt. 260.

The acquiescence of an executor in the possession of one who has a specific legacy at the testator's death, vests the property without a formal consent—if there be assets enough for payment of debts. 6 Pick. 125.

It is a uniform rule that where any thing remains to be done by executors, their assent to the enjoyment of the particular estate will not imply their assent to that in remainder. 1 Bailey's S. C. Rep. 633; 1 Murphy, 189.

If A. be the executor of B., and the testamentary guardian of C. the daughter of B., and the testator gives a bond as a specific legacy to the daughter, and A. receives the bond and charges himself with it in his account as guardian of C., this is an assent.

An acceptance of the legatee is as necessary as the assent of the executor to perfect the legatee's right. 1 Bailey's So. Car. R. 504.

§ 23. Whenever an executor, or administrator, *cum testamento annexo*, assents to a legacy, the legal title passes to and vests in the legatee, who alone can maintain an action to recover it, from any person having it in possession; and the assent once given, is irrevocable at law, even though assets prove insufficient for payment of debts. 6 Dana, 155. And the property is not afterwards subject in the hands of the legatee to an execution subsequently obtained against the executor. 2 Hill's Ch. R. 459—But see 1 How. 207. But a creditor of the testator has an undoubted right to pursue the legacy in the hands of the legatee, after the assets in the executors hands have, in any way, been exhausted. It might be different, if the creditor stood by and saw the executor dissipating the assets without making any effort to save himself. 2 Hill's Ch. Rep. 432; 1 Dev. Eq. 337; 2 Dev. Eq. cas. 437.

Until the assent of the executor, the legal title is in him; and if, before assent, he permit a stranger to acquire a title under statute of limitations, the legatee is also bound as to the stranger—though an infant. 1 Bailey's So. Car. R. 504.

The assent of the executor *bona fide* with legatees to defraud creditors, vests the legacy in the legatee beyond the control of the executor or any creditor having to reach property through execution against executor—and after such assent a sale of the legacy would be void. 2 Hill's Ch. R. 522.

An executor's assent to the first taker is an assent to all subsequent takers of a legacy limited over by way of remainder in executory devise.—2 Car. L. R. 469; 1 Dev. Eq. 337—Otherwise if after the first taker's death, the executor has a trust to perform arising out of the property. *Ibid.* 1 Murphy, 189; 1 Bailey, 633.

If a legatee in a will is also executrix, and elects to take as legatee, her power as executrix over the property bequeathed thence forward ceases—her assent operates for the benefit of the ulterior

remainder-man, and converts their equitable into a legal estate.—N. C. T. R. 212. See also 3 Murph. 110; 2 Hay. 161; 1 Dev. & Batt. 334.

Where a negro woman is bequeathed to A., and her issue, if she should have any, to B., the assent of the executor to A.'s legacy is an assent to B., and vests the legal title in him—2 Hawks, 122—and the executor may require a bond for both. *Ibid.*

LEGACY—TIME OF PAYMENT.

§ 24. An executor is not compelled to pay legacies till a reasonable time has elapsed after the testator's death. In the absence of any statute, the civil law, which gives one year, will afford the rule of limitation.

A distributee is entitled, after the expiration of twelve months from the grant of administration, by giving bond, or, if the estate has been settled, without giving bond, to distribution. 2 How. 808, 972; 1 S. & M. 546. And the party claiming is entitled, if at all, to *all* immediately; and it is error in the Judge to permit the administrator to retain property for the purpose of gathering a growing crop. *Ibid.*

A legacy may be vested, though the time of payment be postponed. 2 M'Cord's Ch. R. 258; 2 Mur. 140; 2 Dev. Eq. 98.

If a legacy be payable to an infant at 21 years, and he dies before, his representatives cannot claim till in case he had lived, he could have claimed it. 2 M'Cord's Ch. R. 258. If payable out of land, at a future day, and the legatee dies before payment, although given with interest in the meantime—the Court will not direct the legacy to be raised till the time of payment; but it will secure a personal fund, for a future or contingent legatee. *Ibid.*

Where legacies are given to several, to be paid at their respective marriages, and one dies, her portion will survive to the others, but will not be payable till the marriage of each—for the condition survived also. 2 Vern. 620. But where legacies are given to three or more as tenants in common, with a bequest to survivors on the death of any one of them within a given time, the original legacies only and not the shares which accrued by survivorship, will survive. 3 Murph. 21. An exception is, where the fund is aggregate, and made devisable among many persons as legatees with benefit of survivorship among them. *Ibid.*

Where the testator disposed, by will, of his *whole* estate, and amongst other things bequeathed certain negroes to W. H. C. during life, with remainder over, and by another clause directed "his estate to be kept together till his debts are paid," it was *held*, that the testator only meant that the absolute right of the legatees should not vest until his debts were paid; that the restrictive clause applied only to the mass of his estate and not to the specific legacy; and the tenant for life being dead, the tenant in remainder was entitled to immediate possession of the negroes, although the debts were not paid, and could retain them until the rest of the estate proved insufficient to pay the debts. 1 Hill's R. 225.

Where a will directed the executors to retain certain money, legacies, till the legatees came of age or married, and that executors should not be charged with interest—the executors are entitled to hold and use the money, free of interest till the time of payment. 4 Dana, 573.

An action to recover a legacy charged on real estate, cannot be supported against the devisee and *terre-tenant* without an express promise to pay it. 4 S. & R. 213. The action should be brought against the executor and *terre-tenants*, and judgment be so entered as to bind the land only. *Ibid.* Executor should be a party. *Ibid.* 509.

If executor promise to pay a legacy as soon as he can sell certain property, an action will lie on such promise. 2 Hay. 153.

LEGACY—INTEREST ON AND PROFITS OF.

§ 25. Where no interest is allowed by the will, it shall now be allowed after the expiration of twelve months from the death of the testator. 7 Ves. jun. 96.* Interest will be given on a legacy payable to a *child* at a particular time, where no provision is made for its maintenance, but not to a grand-child. 2 John. C. 200; 5

*Pecuniary legacies on which no interest is given by the will, bear interest from the end of one year after the testator's death;—and this applies, even where delay in collecting debts, makes it impracticable to pay them at that time. 1 M'Cord's Ch. R. 148; 5 Binney, 475; 14 S. & R. 238; 6 W. 67; 9 ib. 477; 1 Har. 370—Except in case of a legacy to a child not otherwise provided for, when interest is allowed from the death of the testator. *Ibid.* The rule that a child unprovided for will be entitled to interest from the testator's death, does not extend to the case of a widow. 6 W. 67; Sax. Ch. R. 40.

Binn. 479; 14 S. & R. 232; 4 R. 119. And a legacy to a grandchild, payable when he comes of age, carries interest only from that period. *Ibid.* 2 Dev. Eq. 366.

A legacy payable at a particular day, will bear interest only from that day. Toller, 324.

A legacy charged on land, and no time of payment mentioned in the will, carries interest from the time of the testator's death. 2 John. C. 200.

But a legacy to be paid out of funds which the executor is to receive from the devisee of the real estate, is not a legacy charged on the land. 2 John. C. 200. And where testator directed the legacy to be paid out of the increase of his estate, as soon as convenient after the expiration of one year after his decease, or sooner if executor has funds, *held*, it bore interest from one year after the testator's death, and the legacy was ordered to be paid, tho' some debts still remained due, the estate being fully competent. 1 M'Cord's Ch. R. 148.

§ 26. The time when interest shall be allowed on a legacy does not depend on the time when it is received, but when at law it may be received. 1 M'Cord's Ch. R. 98, 148.

A residuary bequest to be paid when the legatee arrives at 21 years, gives a present vested legacy, and the legatee will be entitled to the profits or interest (if any accrue,) in the interval between the testator's death and her attaining twenty-one. 1 Hill's So. Car. R. 123.

Where a contingent legacy in remainder was given on the legatee's attaining twenty-one, and assuming the surname of the testator, and there was nothing in the will showing an intention on the part of the testator to provide a fund for maintenance and education—*Held*, that the legatee in remainder was not entitled to the intermediate profits of the legacy from the death of the tenant for life, until the estate vested in him. 1 Hill's So. Car. Ch. R. 227, 237.*

*The children of a female slave specifically devised, which are born after the execution of the will, and before the death of the testator, go to the residuary legatee. Conf. R. 310.

A legacy to a child *vested*, but not charged on land and payable *with interest*, by the terms of the will at twenty-one—shall nevertheless be paid presently at the death of the child, should he die before the time of payment originally appointed. 1 W. 372.

Where negroes were specifically bequeathed to two, and the share of one is set apart, and a profit is made by the administrator on the other share reserved for an infant, this is no severance of the tenancy in common until the infant arrives at the age of 21 years and confirms it, and in the meantime this profit may be recovered in a joint bill filed by the two legatees. 1 Dev. Eq. 67.

Upon a bequest to children as tenants in common, with a postponement of the division, in the absence of any direction to the contrary, the expenses of each is a separate charge on his share of the profits. 2 Dev. Eq. 531.

Where one bequeathed to the four children of his nephew, the sum of \$400 each, which sums he directed to be placed out at interest, at the expiration of two years after his decease, for the benefit of said legatees respectively, and the principal and *interest* to be paid as they should respectively attain twenty-one—but if any one of them should die in his minority, without issue, the *share* of such child so dying should be equally divided among his brothers, it was *held*, that the legatees were not entitled to interest during their minority, but that it must accumulate, and in case of the death of one of the legatees under age, would form part of the share to be divided among the survivors. 5 Binn. 477.

§ 27. A residue, which is given for a life with remainder over, must be sold by the executor, and the interest paid to the legatee for life, and the principal to him in remainder, because this is the only mode of giving both sets of legatees the enjoyment of those chattels which are perishable. 2 Dev. Eq. 421.

Slaves are in this State (North-Carolina,) an exception to this rule, because they are not consumed in the use, and their natural decay is supplied by their issue, which goes to those in remainder. 1 Dev. & Batt. Eq. 192.

A legatee for life is bound to keep down the interest of a debt charged on his legacy, and may be compelled to contribute to its payment. But he is not bound to surrender the whole profits for the purpose of extinguishing it. 1 Dev. & Batt. Eq. 192.

§ 28. In Mississippi it is enacted, that when any person or persons having a legacy bequeathed in any last will and testament, shall sue for and recover the same either at law or in equity, as the case may be, to give judgment in case of the decree of

the Court, and a verdict in case of a trial by jury for *ten* per cent. damages, in addition to the interest now allowed by law, upon the amount of money so recovered or decreed, and also upon the worth of property in case of a specific legacy. Act of 1839—How. & H. p. 421.

The above rule as to damages, in case of a recovery, shall apply to suits by distributees against administrators, and wards against guardians. *Ibid.* H. & H. 421.

LEGACY—ACTION FOR.

§ 29. By Common law, no action at law lay for the recovery of a legacy, and damages for non-payment of it. 4 Mass. 634, 635.

By act of 1821, in Mississippi, legatees are entitled at the expiration of twelve months from the grant of letters of administration, to petition the Probate Court for and have payment of legacy according to the provisions of the act in such cases made and provided. How. & H. p. 406. (For the act alluded to, see title Distribution, *post.*)

As a general rule, a suit for the recovery of a legacy should be brought against the executor in the jurisdiction having cognizance of the will. Yet when the fund out of which the legacy is payable, is traced to the possession of the heir of the testator, in a different jurisdiction from that having cognizance of the will, the suit may be maintained there. 1 Sm. & M. Ch. Rep. 495.

A specific legatee may under our statute maintain a suit for the property or chattel bequeathed, at law, and without the assent of the executor. The Common law required a resort to a Court of Equity; but this is changed by our statute. 2 Sm. & M. 527.

Assumpsit will lie on a promise of the executor to pay a legacy, in consideration of assets. Cowp. 284—(5 T. R. 690, *contra*, and also 7 Barn. & C. 544.)

But the modern authorities sustain the case in Cowper.

In North-Carolina, if an executor promise to pay a legacy, as soon as he can sell certain property, an action at law will lie on such promise. 2 Hayw. 153.

And in Connecticut, it has been decided that an action at law will lie against an executor who has assets, on an *implied* promise. 4 Conn. 163; 6 ib. 170; 7 ib. 132—See 2 Root, 156, & in N. Jersey; 1 Halst. 432; 2 Penn. 552.

In New-York, it has been decided that an action at law would *not* lie against the personal representatives of the *devisee*, upon the mere implied assumpsit, arising from the devise itself—3 John. R. 189—otherwise, if the devisee had promised to pay it. 7 ib. 99.

In Pennsylvania, assets in the hands of the executor are a good consideration for a *personal* promise to pay a legacy of the testator, and to charge him *de bonis propriis*. 5 Binn, 33. So, in N. York—See 7 John. R. 90; 3 Cowen, 133; 6 ib. 333. So payment of part of the devise: 10 John. R. 30.

And a legacy charged on land, will support an assumption to pay it by the devisee. 5 S. & R. 216—(7 John. R. 90, query?)

It has been said that before the act of 1806, assumpsit did not lie for a legacy. Since that act, I can have no doubt. 2 Rawle, 801, Huston, J.

In an action at law for a legacy, there must be alleged, the bequest, the *probate*, the official capacity of the defendant, his reception of assets, and a demand—4 Mass. R. 634. Either assets or executor's assent must be shown—6 Pick. 126. A demand must be shown—3 Pick. 213; 14 Mass. 428. So in case of a forfeited devise—21 Pick. 389.

And plaintiff must allege a sufficiency of assets to pay all debts and legacies, at the commencement of his suit. 7 John. R. 243.

§ 30. A father cannot, as natural guardian, demand and recover payment of a legacy due to his child. But if the executor resists payment solely on the ground that his child has no claim, it is a waiver of the right of demand. 3 Pick. 213.

Where a legacy is charged on real estate, the legatee can sue for it. 7 Pick. 296.

A husband, after his wife's death, may maintain an action in his own right, to recover a legacy given to her during coverture. 22 Pick. 480.

Where there are several legacies given which are to be increased or diminished as the estate should increase or diminish, one legatee may file his bill in his own and other legatees behalf, who may choose to come in against the executor for an account and payment. 4 John. Ch. R. 199; 1 Paige, 270. But where the bill

is for the residue, all the residuary legatees are to be parties to the bill. *Ibid.*

Where several suits are brought for general legacies, and the estate is insufficient, the Court will direct an account to be taken in one suit only, and all the other suits to be stayed---1 Paige, 416. The Court will direct the account to be taken in the suit most beneficial to the legatees, and in case of doubt about that, will refer it to a master to ascertain what suit is most for the interest of persons interested. *Ibid.*

The children of a deceased legatee cannot recover without administering on deceased legatee's estate---4 Paige, 47.

Where a feme covert has a contingent interest in personal estate, a suit after her death must be brought by her administrator, but her heir may sue for rents and profits of land.---10 Pick. 462.

§ 31. Where a husband and wife sue for the wife's legacy, the Court will direct a suitable provision to be made out of it, for the maintenance of herself and her children, before decreeing payment of the legacy to her husband---4 John. Ch. R. 199; 1 Paige, 270---20 Pick. 378.

§ 32. Where plaintiff in his bill sets up a claim independent of the will to part of the property devised in trust to pay the legacies, he must elect to waive his claim, or wait until it be determined before he can call for an account or payment of part of his legacy.---1 Paige, 270.

§ 33. Where a testator devised his real and personal estate to two of his sons, charged with certain legacies, and legatees filed bill and obtained decree for sale of real estate, which, on being sold, proved to be insufficient, and no decree was prayed for in the preceding suit charging the devisees personally---*held*, legatees could not file a new bill for that purpose.---1 Paige, 407.

§ 34. A devisee, who has been compelled to pay a legacy, may call on a co-devisee for contribution, but not for any loss by the insolvency of other devisees.---10 Mass. 450.

A devisee, molested in the enjoyment of the land, by the creditors of the testator, may sue the executor for mal-administration, or his co-devisees for contribution.---4 Mass. 150, 154.

§ 35. If a legatee accepts a dividend on his legacy by order of the Judge of Probate, where there is enough to pay all, he will be concluded thereby though his legacy be specific.---4 Mass. 632.

§ 36. Courts of Equity can entertain no jurisdiction over legacies till the will has been admitted to probate in the Court of Probates.---12 Wheat. 169.

CHAPTER XXVIII.

PROBATE OF WILLS.

§ 1. After the consummation of a last will and testament, it becomes necessary to have it proved and registered in a Court of competent jurisdiction, which, in this State, is the Court of Probates.

But proof and registration are not essential to the validity of a will.---3 Marsh. 90.

§ 2. There is no time limited for proving a will---5 Littel, 273; 4 Monroe, 153; 1 M'Cord, 74.

But it is too late to prove a will of personalty after 30 years.—So. Car. Con. Repts. Treadwell's ed. 505---9 Dana, 191.

And nuncupative wills must be proved within six months from the testator's death, unless the testamentary words were reduced to writing within six days after speaking the same. See *ante* page 55. And a nuncupative will can only be proved in solemn form because the statute requires a citation of the next of kin---*Ante* p. 55.

§ 3. A will may be proved either in common form—i. e. without citing those interested, and upon the mere deposition of the executor—4 Dev. 430—or, in solemn form or form of law, as where the widow or next of kin to the decision are cited to be

present, and in their presence the will is exhibited, witnesses examined, their depositions published, and the judge determines the question of its validity.---4 Dev. 430.

The first kind of proof (in common form,) does not excuse the executor from proof in form of law; but the will may afterwards, within a limited period, be contested by any person interested, in the mode prescribed by law. How. & H. sec. 17, ch. 36, p. 389.

§ 4. The Orphan's Court of each county in this State shall have power to hear and determine all causes, matters and controversies arising within their respective jurisdictions, and to examine and take the proof of wills, and grant letters testamentary thereon, according to the provisions of this act.

Jurisdiction having once attached will not be affected by a subsequent division of the county---2 Marsh. 229; 3 Marsh. 510, 614; 9 Cranch. 151---Littel's Selected Cas. 461---and probate in one county is proof throughout the State---4 Monroe, 423.

Where a resident of Kentucky dies intestate there, have no estate in Virginia, but a claim on the Commonwealth for money, it was *held*, that *Henrico county*, where the seat of government was, had jurisdiction to grant letters. 2 Leigh, 248.

But the debts due from the United States have no locality at Washington City, the Seat of Government. The United States have no particular domicil, but possess a legal ubiquity. 15 Peters' R. 1.

§ 5. I. If any testator shall have a mansion-house, or known place of residence, his or her will shall be proved in the Orphan's Court of the county wherein such mansion-house or place of residence is.

II. If he or she has no place of residence, and lands be devised in the will, then the will may be proved in the Orphan's Court of the county wherein the lands lie, or in one of them where there shall be lands in both counties.

III. If he or she have no such known place of residence, and there be no lands devised, then the will may be proved either in the Orphan's court of the county where such testator or testatrix died, or that wherein his estate or a greater part thereof lie.---How. & H. ch. 36, sec. 17, p. 388.

§ 6. "It shall be lawful for any Orphan's court, when any will is produced to them for probate, and any witness attesting the same shall reside out of the State, to issue a commission or commissions annexed to such will, and directed to the presiding Judge of any court of law, or any Notary Public, Mayor, or any Chief Magistrate of any city, town, corporation or county, where such witness may be found, authorizing the taking and certifying his or her attestation. If the person to whom such commission shall be directed shall certify, in the manner such acts are usually authenticated, (for which see How. & H. ch. 46, sec. 17, p. 603,) that the witness personally appeared before him and made oath or affirmation, (as the case may require,) that the testator or testatrix signed and published the writing annexed to such commission as his or her last will and testament, or that some other person signed it by his or her direction, that he or she was of disposing mind and memory, and that he or she subscribed his or her name thereto in the presence of the testator or testatrix, and at his or her request, such oath or affirmation shall have the same operation, and the will be admitted to probate in like manner as if such oath or affirmation had been made in the court whence such commission issued." How. & H. page 387.

The statute authorizing a *dedimus* to take the deposition of attesting witnesses, who reside abroad, is *cumulative*, and does not compel parties to resort to it. Inferior testimony may be resorted to in case of wills, as well as in other cases, where the best testimony is not within reach of the court. 1 Littel, 103, 104; 4 Randolph, 585.

The statute does not require that the will shall be proved by the attesting witnesses only, but it may be proved as other attestations may be, subject to the like rules of evidence. 5 Monroe, 179; Powell on Devises, 708, 710; Blackf. R. 563; Gibb. R. in Eq. 563; 4 Burr. 225; 1 Con. S. Car. R. 336; 1 Green's Ch. R. 220.

§ 7. "When any will shall be exhibited to be proved, the court having jurisdiction as aforesaid, may proceed immediately to receive the probate thereof, and grant letters testamentary." How. & H. ch. 36, sec. 17—(See also sec. 18 of same chap.)

If, however, any person interested shall, *within five years* afterwards appear, and by his or her bill in Chancery, contest the validity of the will,* an issue shall be made up, "whether the writing produced be the will of the testator or testatrix or not," which shall be tried by a jury in the Circuit or Superior Court of the county where such will shall have been recorded, (or in the court of Chancery, as the Chancellor shall direct—but see *ante*, page 19, sec. 3, and 7 How. 143, and note,)—whose verdict shall be final between the parties—saving to the Court the power of granting a new trial for good cause, as in other trials. But no such party appearing within that time, the probate shall be forever binding—saving always as to infants, femmes coverts, persons absent from the State, and *non compotes mentis*, the like period after the removal of their respective disabilities. In all such trials by jury the certificates of the witnesses at the time of the first probate, shall be admitted as evidence to have such weight as the jury shall think it deserves." How. & H. ch. 36, sec. 17—See 4 Sm. & M. and 6 Sm. & M.

§ 8. Although the statute requires three witnesses to a will, one of them may prove it—2 J. J. Marsh. 511; 2 Marsh. 467; Littel's Sel. cases, 503; 1 B. Monroe's R. 57; 2 Nott & M'Cord, 588; 4 Cowen, 483; 19 John. 386; 1 Peters, 508; 2 Har. (N.J.) 86.

And if one witness testify expressly to the fulfilment of every ceremony required by statute, it is sufficient—7 Halsted, 70; 1 Green's Ch. R. 8.

And if admitted and recorded on the testimony of one witness, it will be presumed that he proved all the requisitions—1 Green's Ch. R. 8.

If two of three attesting witnesses reside out of the State, and cannot be procured by any legal means, the will may be proved by the remaining witness, he proving the hand-writing of the other two—4 Rand. 585; 2 Green's Ch. R. 8; 5 Yerger's R. 307—And if two are dead and a third absent or lunatic, proof of their hand-writing by a credible witness will be sufficient—2 Bay. 187; 1

*Whenever the dispute is about the *fact* of the execution, or the *sanity* of the testator, an issue is proper; but if about the *legality* of the execution, the Court is the proper tribunal. 6 S. & R. 489.

M'Cord, 74; 11 Wend. 599; 4 ib. 443; 5 Conn. 164; 2 Dev. & B. 211; 3 Y. 345---If *all* are dead, proof of the hand-writing of *all* is requisite before proof of the testator's can be allowed---2 Bay. 484; 1 M'Cord, 74---If *all* reside abroad, proof of the hand-writing of two of them is sufficient---2 No. Car. R. 311; 2 Dev. & Bat. 311: 4 Yeates, 345---If witness cannot be found, proof of his hand-writing is admissible---2 No. Car. R. 313---"If to be found" in the act of 1789, (Tennessee,) when speaking of witnesses to a contested will, means, if to be *found by the officer* in whose hands the process is placed, and the return of the officer that the witness cannot be found, is evidence of that fact---5 Yerger, 307.

The act of 1789, (N. Carolina,) requiring a will when contested, to be proved by all the attesting witnesses, *if found*, is satisfied by proof of hand-writing, if they are out of the State, lunatic, or the like---2 N. Carolina, 311---And if three live out of the State proof of the hand-writing of *two* is sufficient. *Ibid.*

When the witness proves his own hand-writing, but does not remember the circumstances of the attestation, the rational conclusion is, that he subscribed it in the presence of the testator.—But this presumption is abundantly fortified by his recollection that he attested some instrument at the request of the testator, and that it is his invariable habit not to attest an instrument, as a witness, unless it be acknowledged by the person who purports to have executed it---2 Littel, 137; 4 Bibb, 21; 2 Strange, 1109; 5 John. 144; 1 Littel, 101; 3 J.J. Marsh. 116; 1 M'Cord, 272.

Where one witness testifies that the will was executed as the statute requires, but does not recollect that the other witnesses subscribed their names in the presence of the testator, but does recollect that they were part of the company present, and recognizes their hand-writing, and other witnesses also prove their hand-writing, the Court may well be satisfied that the witnesses did *then* attest the will, in the testator's presence, and there is no compulsion to take a *dedimus* for the deposition of the other witnesses---1 Littel, 103, 104. But, where one witness states that he wrote the will by the direction of the testatrix, and signed his name in her presence, and that the other witnesses signed their names also in the same room with the testator, although the second witness could not recollect whether she signed it in the

same room or another; and the third witness says he signed it in another room where the testatrix could not see him, the proof was deemed insufficient to establish that will. 5 Monroe, 199; 2 Littel, 137.

§ 9. If one subscribing witness prove the attestation of a sufficient number of witnesses, in presence, and at the request, of the testator, it will authorize the presumption of publication and signature before or at the moment of attestation. 1 B. Monroe's R. 116.

And one witness need not prove that testator was of sound mind and memory, where the will is proved to be wholly in the hand-writing of the testator—for this fact is evidence of his capacity. 4 Bibb, 244.

Where one witness only is admitted, he must be credible, and his testimony direct and positive. His "impressions" and statements "according to his recollection," are not sufficient---1 Dana, 163.

An attesting witness who, since the attestation has become interested, need not be produced, but the will may be established by other witnesses. 4 Dev. N. Car. R. 502.

§ 10. Testamentary witnesses and the facts they state, as occurring at the execution of the will, are particularly to be regarded by the Court---1 Green's Ch. R. 8. But the statute does not require that the will shall be proved by the attesting witness only. It may be proved as all other attestations may, subject to the like rules of evidence.---Powell on devises, 708, 710; 5 Monroe, 199; Blackf. R. 365; Gibb. R. in Eq. 364; 1 Con. R. So. Car. 336; 1 Green's Ch. R. 220---Wills have been established even in opposition to the denial by witnesses, who attested, of their signatures. 2 Littel, 137; 4 Bibb. 21.

As a general rule, a will of personal estate is required to be proved by two witnesses, though it is not always required that they should be subscribing witnesses.—As where the will is written by the testator himself, it is good if the hand-writing be proved by two witnesses, or if the execution and identity of the will is proved by one witness and the hand-writing by the other---5 Yerg. 425. In Mississippi, a will of personalty requires only one witness---See *ante*. p. 43; 5 W. 425.

§ 11. The probate of a will in common form, may be set aside after the term expires, at which the will was proved; and a second probate be ordered by the same Court. The Court will look at all the circumstances to aid its discretion in ordering a second probate---1 Murphy, 99---and it may be at the instance of the next of kin. 4 Dev. 430.

But where an issue of *devisavit vel non* had been made up between some of the next of kin and the executor, and the issue found against the will, a devisee, who had not been a party was not permitted to come in afterwards and have the issue re-tried. (But see 6 Sm. & M. as to infants, and 4 Dev. 430, as to parties.) Our courts of Probate are courts of Record, and what is done by them is conclusive---2 Hayw. 164. Therefore, the probate of a will ought regularly to appear upon the minutes of the County Court, and the will itself ought to be recorded. 2 Dev. 527; 1 W. & S. 398.

Where a will of land appears to have been attested by two witnesses, and the certificate of probate states it was proved by one, it will be intended *prima facie*, it was legally proved by him.—No. Car. T. R. 13.

A grant of administration is presumptive evidence of the probate of a will. 1 W. & S. 396.

§ 12. The next of kin has the right to have the probate of a will, taken in common form recalled, and the will proved *per testes*, unless after notice of the probate he has been guilty of gross *laches*, or long acquiesced in it—and this without making affidavit of recently discovered testimony, to impeach the will---4 Dev. 430, & 1 Dev. & Bat. 482. And the receipt of a legacy under the will, or a claim, by bill in equity, of a trust in the whole estate under the will, is not an acquiescence which will bar this right. 1 Dev. & Batt. 482.

Probate of will in common form implies that the next of kin are not privy to it; but this presumption may be rebutted by lapse of time, or notice of a contest between the executor and another of the next of kin. 4 Dev. 430.

§ 13. But courts of Probate act on different principles in applications to revoke letters of administration, and to re-propound a will which was once rejected. The *latter* is never done at the

instance of the executor, who formerly propounded it, except in cases of fraud, surprise or newly discovered testimony---4 Dev. 430. Devisees are not represented by the executor, and are not affected by a sentence against the will, when propounded by him, unless they are parties to the proceeding. *Ibid.*

But, where a will giving the executors power to sell land, and directing them to pay the interest of the personalty to a married woman for her life, and after her death to divide the whole and the rents of the land between her children, was propounded by the executors, and on the caveat of her husband was rejected, the sentence is conclusive, both on her infant children then in being and those born afterwards. 4 Dev. 430.

For whenever the depositary of a power is bound by the sentence of a Court of Probate, the person interested in the power, or *cestuy que trust*, is, in that court, also bound---4 Dev. 430---And where a power over the land is created by the will, the depositary of the power is the only actor, in the Court of Probate. *Ibid.*

§ 14. Where a petition is filed to set aside the probate of a will, it must be accompanied with an affidavit---2 Car. L. R. 414, 634. Nor will an affidavit before a magistrate of another county be sufficient. 2 Car. L. R. 634.

In a petition to have the probate of a will set aside, and a re-probate in solemn form, all the heirs and distributees need not be made parties. It is sufficient, if the petition be brought by one of them, and all the executors, devisees and legatees, claiming under the will, be made defendants. 1 Hawks, 58.

Where a petition for re-propounding a will for probate, does not state, between whom the issue, on the first attempt to prove it, was joined, nor show whether the proper persons were parties to that issue, nor whether the executor acted *bona fide* or otherwise, so that the court cannot see whether the petitioners were or were not bound by the finding on that issue---the petition will be dismissed without costs, and without prejudice to the right of the petitioners to propound the same again, in proper form, before a competent tribunal. 1 Dev. & Batt. 186.

§ 15. An application to set aside the probate of a will, on the ground of irregularity, must be made to the court which erred,

or to one of controlling power. Therefore, where a will was offered for probate on the ground of irregularity, to the County Court, an appeal taken from the decision to the Superior Court, and the cause thence removed to the Superior Court of an adjoining county, which after a trial by jury, ordered the will to be there recorded and a copy to be sent to the Circuit Court, where the suit originated, to be recorded there also, the County Court cannot order a probate *de novo*, on the ground of irregularity. 2 Car. L. R. 613; 1 Dev. 459. But see *ante*. ch. 5, sec. 9, p. 24.

§ 16. Upon the probate of a will in the Superior court, under an issue of *devisavit vel non*, the clerk of the Superior court should return the will with a certificate of its probate to the county court, and the county court should direct both the will and the record from the Superior court to be recorded. A copy of the will and of this certificate under the seal of the county court, is a sufficient attestation of the probate---2 Dev. 393. The Circuit (or Superior) court, can only certify the verdict of the jury to the court of Probates, that judgment may be rendered thereon in the latter court. And an application for a new trial must be made in the latter court, after certifying such verdict---2 Paige, 487; 2 Rob. Prac. 356, cited 6 Sm. & M. If refused there and finally disposed of, the whole case may be brought up to the court of Error---*Ibid*. If the circuit court render a judgment, it is a nullity---*Ibid*.---decided January tr. 1846.*

A copy of the record from the Superior court establishing the will and a copy of the will, both authenticated by the clerk of the county court, would entitle the will to be read---2 Dev. 393. But a mere certificate of the will being so proved and recorded, though under the seal of the county court, is not a sufficient attestation of the probate---*Ibid*. And although the certificate of the clerk on the will itself, has commonly been received as sufficient, yet if this certificate be made and signed by the *deputy*, it is not a legal probate, and the fact that the will is on the files of the court, will not aid it. *Ibid*.

*By act of 1821—"In all such trials by jury, the certificate of the oath of the witnesses, at the time of the first probate, shall be admitted as evidence, to have such weight as the jury think it deserves. How. & H. p. 389.

§ 17. The best proof of a will, according to the rules of the Common law, is the production of the instrument, if that can be had, and an exemplification of the will under the great seal, would not in the English courts be evidence to a jury in ejectment; nor would the probate of the will in the Spiritual court be evidence in such case, even where the will is lost. If the will is lost, the Register book, or ledger book, or an examined copy—or if there be no such copy, parol evidence may be received, as secondary evidence of its contents, but the probate will not be received as such evidence. Roscoe Ev. 72-3—cited in 3 Lomax, 50.

There seems in Virginia to be the same ground where the will has been exhibited and admitted to probate merely as a will of personalty, for excluding the probate of the will as evidence to sustain a title by devise. But where the probate of the will is general and indefinite in its terms, so that it is *not confined merely to the personalty*, then the probate will be evidence before a jury, and upon showing the probate of the will, they may find that the same was duly made and executed, without staking the probate as the evidence upon which they find the fact. 2 Rand. 200—cited 3 Lomax, 50.

Such also, it is presumed, would be the rule in Mississippi, under our statute which says—“*all* original wills, after probate thereof, shall be recorded and remain in the clerk’s office wherein they were respectively proved, except during such time as they may be in the court of Chancery,” (now Circuit court,) “or Supreme court, having been removed thither for inspection, &c.—after which they shall be returned into the said office, and an authenticated copy of *any* will, testament, or codicil, recorded in any office authorized to record the same, shall be admitted as evidence in any court of law or equity in this State. Acts, 1821: How. & H. 387—See also 3 How. 148.

PROOF OF LOST WILLS.

§ 18. To warrant the proof of a lost will, not shown to be destroyed by parol, it must be shown that diligent search was made for it, at the place where it was most likely to be found—as, where the testator usually kept his most valuable papers. Cow. 208; 4 Cowen, 483; 11 Wend. 599.

Proof of search for, or loss of a paper, to warrant secondary evidence of its contents, may be made by the oath of a party in the cause, though he be interested. *Ibid.*

The testimony of a witness proving that, on search made in a Surrogate's office for a will, which according to the law relating to ancient wills ought there to have been deposited, such will could not be found, is equivalent to the testimony of the Surrogate himself, although the witness is not a clerk in the office. The certificate of the Surrogate is not the only competent evidence.---*Ibid.* See ante. sec. 17.

Where a witness to a lost will proved its due attestation by three witnesses, but had forgotten the name of one of them, having no doubt however that he was a competent witness, this was held sufficient. 4 Cowen, 483; 6 ib. 377.

§ 19. "If any person shall be a subscribing witness to a will wherein any devise or bequest is made to such subscribing witness, and the will cannot be otherwise proved, the devise or bequest to such witness shall be void; and he or she compelled to appear and give testimony on the residue of the will in the like manner as if no such devise or bequest had been made. But if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of said share shall be saved to such witness as shall not exceed the value of the said devise or bequest made to him or her in the said will. Acts, 1821—How. & H. p. 388.*

All those who are capable of being witnesses to any other matter, are capable of being witnesses to a will---3 Lomax, 43---And till the foregoing statute, neither a legatee or devisee was a competent witness, to the will containing the legacy or devise in his favor. As to admissibility of witnesses to will in England before the statute of Geo. 2d, see the two celebrated cases of *Wyndham vs. Chetwynd*, 4 Kent's Com. 509; and *Doe ex dem. Hindson vs. Kersey*, 1 Burr. R. 414; 2 Str. R. 1253---also 1 Day's Conn. R. 41;

*A person who signs a will, as a subscribing witness, against the consent of the testator, and after he has been told by the testator, that he shall not be a witness to it, is not a good subscribing witness. *Tilley's will*—Chancellor Williamson, N. Jersey, July tr. 1827.

9 Pick. 350; 4 Dess. 274; 2 Bay. 448; 16 Mass. 433; N.H. R. 273; cited in 3 Lomax, 44, & *seq.*

If the devise or legacy be to the husband or wife of the witness, such devise will be equally void as if made to the witness, and the party becomes a competent witness. 1 John. cas. 163; 2 John. cas. 314.

A legatee may be a good witness against a will, because he swears against his own interest. Salk. 691.

An infamous person is not a competent witness to a will—4 Burn's Eccl. L. 95, cited in 3 Lomax, 45—though he has become so since his attestation of the will—5 Mass. R. 219. But in the latter case, the will is not invalidated. *Ibid.* See ante. page 100, *et seq.* ch. 15.

§ 20. On a question as to the validity of a will, a witness may be asked "whether from his actual knowledge of A. B. (the alleged testator,) he considered him fit or unfit to make a will"—11 S. & R. 141—"what opinion he formed of the sanity of the testator at or about the time of the will being made"—but not "what he said to third persons on the subject." 3 W. C. C. R. 580; 3 P. C. C. R. 580.

The opinion of witnesses, founded on facts known to them and conduct within their own observation, may be asked, but not their opinions on an assumed state of facts, or on facts sworn to by other witnesses, as to the capacity of the testator—7 S. & R. 90. On an issue *devisavit vel non*, all the witnesses, if to be had, are to be examined at law—Coop. 138; 3 Lomax, 52. See also ante. ch. 15, pages 100, *et seq.*

§ 21. Upon an issue of *devisavit vel non*, it is not absolutely necessary, as a rule of law, to prove, besides the capacity of the testator and the formal execution of the will, the further fact, by distinct evidence, that the testator knew the contents of the instrument. For the jury may infer such knowledge from the evidence of capacity and execution—1 Dev. & Batt. 276; *ib.* 82. Nor is a will, written for a testator *in extremis*, by one standing in a confidential relation to him, and who takes a benefit under it, invalid by conclusion of law, unless read over to the testator, or its contents otherwise proved to have been known to him. These facts

must be left to the jury, and from them fraud may be inferred, unless repelled by proof of *bona fides*.—*Ibid.* 82; 2 Dev. 291, & 3 W. C. C. R. 580.

The Judge of Probate is competent to decide as to the sanity of the testator, and it seems that when his mind is satisfied, it will not be error for him to refuse to hear further circumstantial evidence. 4 How. 459.

CHAPTER XXIX.

FOREIGN GRANT OF ADMINISTRATION.

§ 1. Having adverted to the rules respecting foreign wills, and the mode of authenticating them, so as to entitle them to probate in Courts of Probate within this State, and also considered generally the manner of probating wills and the effect thereof, it will not be out of place here to consider the effect of a grant of letters testamentary or of administration in one State, upon the assets of the testator or intestate, situated in another State.

§ 2. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it and does not, *de jure*, extend to other countries. It cannot confer, as a matter of right, any authority to collect debts of the decedent in any other State. And whatever operation is allowed to it, beyond the original territory of the grant, is a mere matter of courtesy, which every nation is at liberty to yield or withhold according to its own policy and pleasure, with reference to its own institutions and the interest of its own citizens.

The administrator is exclusively bound to account for all the assets, which he receives under and by virtue of his administration, to the tribunal from which he derives his authority. The tribunals of other States have no right to interfere with or control the application of those assets according to the *lex loci*. Hence no administrator can sue in his official capacity, for any debts due to his intestate, in the courts of another State, and is not liable to be sued in that capacity, in the courts of the latter by any creditor, for any due there by his intestate.—Vaughn et al. *vs.* Northup; 15 Peters, 1, 6, citing 1 Cranch, 259; 3 Cranch, 319; 9 Wheat. 565; 7 Cowen, 64—See also 2 Metcalf, 114, 116; 3 Mass. 514; 1 Pick. 81, 86; 11 Wend. 372; 9 ib. 425; 3 Day, C. C. R. 303.

But if he collect abroad, he may be charged with them here as executor *de son tort*.—*Ibid.* 7 John. Ch. R. 45, 47—(2 Simon & Stu. 384, *contra*) Story's Confl. of laws, 425, 431.* See 7 Cowen, 64.

The administration of personal estate is governed by the *lex loci*—but of the real estate by the *lex rei sitæ*.—3 Metc. 109, 114; 10 Pick. 77, 108; 9 Cranch. 151; *Ib.* 418; Story's Confl. of laws, 418, 421.

A foreign administrator cannot assign a mortgage of lands in this State—(Masstts.)—1 Pick. 81, 86—nor can land in Ohio be sold by an administrator in Connecticut under an order of the Orphan's court *there*, though the proprietor lived and died in Connt.—1 Ohio, 572—nor can a power given by will in Virginia to an executor, to sell lands in Ohio, who refuses to qualify or act, be executed by an administrator with the will annexed, tho' the statute in Virginia gives such administrator, in such case, power to sell land.—2 Ohio R. 126; 3 Ohio, 486. But he may assign a negotiable note or bill, in another State. 2 Peters, S. C. R. 239.

*The act of Congress of June, 1822, authorises any person to whom letters testamentary or of administration have been granted in the States of the United States, to prosecute claims by suit in the District of Columbia. This does not authorize suits *against* executors and administrators. The effect of the law was to convert local, into general assets, to be accounted for by the executor or administrator in the Courts granting administration. 15 Peters, 1, 6—citing authorities as above.

Debts due from the United States are general and not local assets. 15 Peters, 1.

§ 3. An administrator can maintain an action for debts in one State, in his individual capacity upon a judgment recovered by him as administrator in another State, for on that he need not sue as administrator.—16 Mass. 71. He may also maintain a suit here, though appointed abroad, on a note payable to his intestate or bearer. 9 Wend. 423, 425.

As to the general power of administrator or executor, within the State of Ohio—see 2 Ohio R. 126 to 133—and ante. sec. 2.

A judgment against an administrator in one State is not binding in another State—2 Rawle's R. 431—unless the same person be administrator in both.—Story's Conf. of laws, 436.—For there is no privity between them.—2 Hill's So. Car. R. 614. So judgment obtained by administrator in one State is not a ground of action by the administrator in another State. Story's Conf. 437.

§ 4. An executor or administrator cannot withdraw assets from another State, without paying debts there. It would be a hardship to permit this and thereby drive creditors for their remedy to the domicile of the deceased. Palmer's R. 163; 3 P. Wms. 369; 2 Ves. 35; 1 Price's R. 179; 2 Madd. R. 101; 1 Hag. Eccl. R. 93, 239; Metf. pl. 177; 1 Cranch. 259; 3 ib. 319, 323; 9 Wheat. 565; 12 ib. 169; 2 N. Hamp. 291; 4 Rand. 158; 2 Gill. & John. 493; 5 Greenl. R. 261; 3 Mass. 514; 5 Mass. 67; 11 ib. 256, 313; 20 Martin's La. R. 232; 3 Day, 74, 303; 4 Mason's R. M. 16, 32; 5 Pick. 65; 20 John. 229, 255; 7 Cowen, 64; 2 Sim. & Stu. 284; Peters R. 518—cited in 1st Kinnie's L. Comp. 392, 4.

For statutory provisions on this subject, in Mississippi,—see How. & H. 406, 415.

§ 5. Where the assets of the decedent are in *transitu*, if administration is granted to different persons in different States, the one first taking possession of the property shall administer. If to the same persons in different States, he must settle in one State by showing what has been inventoried by him in the other. 3 Paige, 459. Immediately on the return of transient goods, such as ships, and cargoes, &c. to the domicile of the owner, whether by remittance or otherwise, it is understood to be under the control of the

administrator there.—Story's Conf. 434-5. In a case, where the personal estate consisted of stage coaches and horses, forming a daily line, in two States—the Chancellor of New-York decided, that if administration had been granted to different individuals in the two States, the one first getting possession within his own State should administer—but where one person administers in both States, it would be necessary to ascertain what had been inventoried and accounted for by him in each State respectively.—3 Paige, 459; Story's Conf. 435-6.

§ 6. An executor or administrator in one State is bound to take measures for the collection of debts due his decedent's estate from a debtor residing in an adjoining state, either by obtaining himself, or employing an agent to obtain, letters of administration, and institute proceedings there in virtue thereof—11 Wend. 361—and more than ordinary diligence will be exacted of him in the performance of this trust. *Ibid.*

It is not necessary as a prerequisite to ancillary administration, that original administration, in the jurisdiction where the deceased dwelt, should have been previously granted. 11 Mass. 256.

Any other administration than that granted where the deceased had his domicil, is *ancillary* merely. 3 Metcalf, 109, 114; 11 Mass. 256; 9 ib. 337.

Where an original administrator or another person takes out new administration in a foreign country, to administer assets *there* situated, still the new administrator is subservient to the rights of creditors, legatees, &c. in this State, and the residuum is transmissible to the foreign State only when the final account has been settled in the domestic tribunal, according to its laws. Story's Conf. 422; 1 Mason's Rep. 381; 3 Rawle, 312—(See also *ante*. sec. 4)—see 3 Rawle, 319.

And if one has taken out letters of administration in another State as well as in this, and the other State were the domicil of the testator or intestate, the administrator is not accountable at law, in this State, for assets received by virtue of his administration in the other State. If the intestate's domicil were in this State, the liability of the administrator in our courts would depend on the enquiry, *whether*, his taking possession of the surplus assets

in the other State, as administrator of the domicile, would be regarded by the laws of that State as a discharge of his administration there. And these matters may be investigated under a plea of *plene administravit*. 2 Bailey's So. Car. R. 436—See 3 P. R. 185.

§ 7. Under an ancillary administration, the administrator can collect and pay debts, and is liable for the contracts and duties of the testator or intestate—which may be recovered or enforced within his jurisdiction, but is not liable in the court of Probate on any partial account to be there rendered and adjusted, to a decree, either of payment or distribution, whether for a legacy or to any person claiming a share by succession. 9 Mass. 337; 10 Pick. 77.*

CHAPTER XXX.

ADMINISTRATION.

§ 1. In England, the right of Administration belonged *first*, to the testamentary executor, who was appointed by the testator, to execute his will—*secondly*, to the *dative* executor, who was called administrator with the will annexed,—and who was appointed by the Ordinary or Bishop of each diocese, when the executor named in the will, either would not or could not act as such. An administrator thus appointed, was chargeable to the Ordinary in the same manner, as if he had been appointed by the testator. *Thirdly*—the legal Executor, being the Ordinary

*Where letters of administration are granted, and the will having been made in a foreign country, remains as a record in some public office there, the proper course is to annex an authenticated copy of the will to the letters of administration. 1 Paige, 13—(See How. & H. p. 368, 387)—and see 1 Sm. & M. Ch. R. 495—which decides that a certified copy of the will from the Probate Court of this State will be admissible as evidence.

himself, when no executor was appointed by the testator in his will. Swinb. part 6, sec. 1.

These various classes with their respective powers, duties and liabilities, will be separately considered in the following pages.

It must be borne in mind that the administration of *personal* estate of every description, of every person after his death, belongs to his executor or administrator. Lands, tenements, and hereditaments, descend to the heir—Swinb. part 6, sec. 3, (4)—and the executor or administrator shall not meddle with them.—*Ib.*

The appointment of an executor or administrator is indispensable, as not even next of kin can manage the estate without taking out letters. 1 M'Cord's Ch. R. 324.

WHO MAY BE EXECUTOR.

§ 2. Every person may be an executor except such as are forbidden. Swinb. part 5, sec. 1, c.; Comyn's Dig. T. Ex'r. B. 2.

At Common law, a *villein* might be appointed by his lord his executor: and in such case, the appointment manumitted him. Swinb. part 5, g.—*Ibid.* So, an infant, or one *en ventre sa mere*. Com. Dig. Exec. B. 2—Swinb. part 5, g.—And the acts of an infant were valid, if strictly within the compass of his office, and not to his own prejudice.

But if the infant were so young as to want discretion, then the ordinary committed the execution of the will to the child's tutor, until he reached the age of 17 years.—*Ibid.*

In Mississippi, a child is qualified to act as executor at the age of 18 years—How. & H. sec. 23, p. 391—and an executorial bond executed by such, shall be as binding as if he were of full age. *Ibid.*

So, at common law, a feme covert might be executrix.—Com. Dig. Exec'r. B. 2—Swinb. part 5, sec. 1, l. But when a woman was made a sole executrix and married, the release by the husband of a debt due to the deceased was good.—*Ibid.*—And a feme covert cannot act without the consent and concurrence of her husband. Toller, 30.

In Mississippi, "no married woman shall be entitled to letters testamentary unless her husband shall give bond with sufficient security, for faithful performance, as in other cases." How. & H. sec. 23, p. 391.

So, at common law, an alien might be an executor.—Com. dig. Exec'r. B. 2—if an alien friend—Toller, 31.

An alien enemy may (in North-Carolina,) qualify as executor, if resident within the State, by permission of the proper authorities, but not otherwise. 2 Murphy, 268.

So, at common law, a convict or attainted person, might be executor—Com. dig. Adm'r. B. 2—So, a monk, or friar, though civilly dead.—*Ibid.*

So, if an executor become a bankrupt, his authority shall not be revoked.—Com. dig. Exec'r. B. 2. Poverty and insolvency are no disqualification of one in whom the testator has reposed so much confidence.—5 Serg. & R. 40; 3 Dess. 93, 94; 1 Cranch. 259; 3 ib. 315. Want of capacity is no ground of removal, if it equally existed at the time of the appointment. 2 How. 905.

A corporation aggregate cannot be executor, because it cannot take an oath to make probate of the will.—Com. dig. Exec'r. B. 2. But see Toller, 30—where is laid down the modern rule, that such a corporation may be executor, and appoint *syndics*, as agents to act for them.

The king, at common law, could be executor, but appointed commissioners to act for him. Com. dig. Ex'r. B. 2.

At common law, the following persons were incapable of being executors:—A heretic; an apostate; an ana-baptist; traitors and felons; an outlaw; an excommunicate; a bastard; an unlawful college;—and to this list the civil law added the libeller.—Swinb. part 5, sects. 2 to 10.

By act of Mississippi, "Persons under eighteen years of age, when letters ought to be granted—or of unsound mind—or incapable, according to law, of making a contract—or convicted of any crime making him or her infamous according to law—are disqualified from being executors.—How. & H. sec. 22, p. 391.—And in all touching such disqualification, the courts shall receive the like testimony as in courts of law and equity, in like cases. *Ibid.*

EXECUTOR---HOW APPOINTED.

§ 3. An Executor may be appointed by a will—written or nuncupative. Toller, 33; 3 Bac. abr. 27.

Any words that denote the intent of the testator, that such an one shall have the care of his personal estate, are sufficient to constitute him his executor.—Com. dig. Ex'r. B. 1; 7 Watts, 51. It need not be express, but may be constructive only, by mere recommendation.—Toller, 35; 2 Black. 503—For numerous examples, see Com. dig. Ex'r. B. 1.

But if B. be made overseer, or coadjutor to the executor, B. will not thereby be constituted executor. *Ibid.*

The appointment of an executor may be absolute or qualified. Toller, 35, n. [z]

A testator may make more than one person his executors. If he appoints more than one, their authority will be joint, and all are considered as one person. Toller, 35, n. a.—Com. dig. Ex'r. B. 1.

A testator may appoint an executor for goods in one country, and another for goods in a different country—Com. dig. Ex'r. B. 1—or, one for one part of his goods, and another for the other part. *Ibid.* Or, one for such a time, and afterwards another.—*Ibid.*—Or, such an one to be his executor, on a contingency or condition, or, that upon such a condition being performed, A. shall be his executor, otherwise, B.—*Ibid.* (In Tennessee, an administrator for certain assets, and for a specific purpose, may be appointed—6 Yerg. 302.) And if the condition is subsequent, A. shall be executor till a breach—*Ibid.* And where the condition is repugnant, as that one of the two executors named shall not administer, it will be void and both may act. *Ibid.*

Each has a right to receive debts due to the estate, and all other assets, and is answerable for what he receives. This responsibility results from the right to receive, and the nature of the trust. A payment to his co-executor will not discharge him. He is bound to appropriate all he receives to the purposes of the will. 14 Peters, 166—Executors are not liable to each other,—*Ib.*

EXECUTOR---HIS REFUSAL.

§ 4. An executor named in a will, is not compelled to act.—Toller, 40. Verbal refusal is not sufficient.—*Ib.*

He may refuse before the ordinary, and his refusal shall be recorded---I Com. dig. B. 4; Tit. adm'r. And if he send a letter to

the ordinary, by which he renounces, and the refusal be recorded, it is sufficient---16 S. & R. 416, So, if a creditor of the deceased, who has been named executor, sues the ordinary for the debt, it is a refusal. So, if he plead that he was never executor.—*Ib.*

His refusal may be *implied*; as, if being summoned, he refuse to take the requisite oath;—this shall be deemed equivalent to a refusal. Toller, 40.

In North-Carolina, it has been *held*, that a formal renunciation in open court, is not necessary. 2 Murphy's N. C. R. 84.

If an executor renounce in person, he must take an oath that he has not intermeddled and will not intermeddle with the goods of the deceased, with any view of defrauding creditors. But if he renounce by proxy, as he may, then the oath is dispensed with. Toller, 40.

In Mississippi, "If any executor named in a will, being required to give security, shall refuse or neglect to give the same, such refusal or neglect shall amount to a refusal of the executorship. So, if *they* shall neglect or refuse for the space of forty days after the death of the testator or testatrix, to exhibit such will or testament for probate, it will be deemed a renunciation, and administration shall be granted with the will annexed—provided each executor named shall have been previously summoned to show cause why administration should not be granted;—and if absent, they shall have sixty days after their return to appear and qualify. How. & H. ch. 36, sec. 18—See 1 Humph. R. 46.

In North-Carolina, if after a lapse of *ten* years from the testator's death, an executor named in a will has not qualified, a renunciation will be presumed---2 Murphy, 84. And such refusal may be presumed not only from lapse of time, but from other circumstances. 2 Dana, 79.

An executor cannot refuse in *part*—he must refuse entirely, or not at all. Toller, 40.

If there be more than one executor, all must renounce before administration can be granted. Toll. 44.

§ 5. After administration, an executor cannot refuse. 1 Com. Dig. B. 4; Toll. 41; 5 John. Ch. 388.

The acts which amount to an administration are such as would constitute an executor *de son tort*—or indicate an election of the

executorship---Toll. 43---as if he take personal property and pay debts. 5 John. Ch. R. 388.

Much less can an executor refuse after having taken an oath before a Surrogate, though a *caveat* be entered. 1 Com. dig. B. 4; Swinb. part 6, sec. 2, (7.)

In North-Carolina, the court of Probates may accept the renunciation of an executor, at any time before he has intermeddled with the testator's goods, even *after* he has proved the will. So can the executor of an executor, as to the first will,---I Iredell, 298. And where A. died, leaving a will, appointing B. his executor, who accepted---and after proving the will, also died, leaving a will appointing C. and D. his executors, who accepted under the latter will, without at the same time renouncing as to the former, but never intermeddled with the effects of the first testator---*held*, that the court of Probates had power, years afterwards, to accept their renunciation and grant administration with the will annexed---of the first testator's estate. I Iredell, 298.

The rule in England is, if an executor of the first executor intermeddled with the goods of the first testator, he cannot refuse to qualify as executor of the latter, but he may assume the last, and refuse the former.---Toll. 45. The same rule appears to prevail in some of the States.---See I Nott & McCord, 326; 2 Hill's R. 221.

But in Mississippi, it is directed that, "in no case shall the executor of an executor be entitled, as executor, to the administration *de bonis non*, of the first deceased." How. & H. 397.

And if administration be granted after the executor has administered, whether before or after oath, the grant is void---Swinb. part 6, sec. 2, [7]---Com. dig. Tit. adm'r. B. 1. 8.

§ 6. If an executor refuses, he cannot afterwards prove the will, if administration has, in the mean time, been granted. I Com. dig. B. 4. But after the administrator's death, he may assume the executorship---Toll. 41---and in such case, he may retract his renunciation, however formally made. *Ibid.*

But if there be several executors, and one renounces, and the others prove the will, the renunciation is not peremptory, and such as refuse may at any subsequent period, either during the lives or after the death of their co-executors, come in and qualify,

and shall be preferred to any executor named by them. Toll. 44; I Ash. 321.*

In Mississippi, "If there be more than one executor, administrator or collector, named in the letters, any one or more of them on the neglect of the rest, may return the inventory, and those neglecting shall not afterwards intermeddle, unless within two months they assign a satisfactory excuse to the court. How. & H. sec. 65, p. 403.

§ 7. If an executor does not refuse, but merely fails to appear, when served with a citation to prove the will, he may afterwards appear and prove the will, though intermediate administration has been granted. I Com. dig. B. 4.

§ 8. Though an executor may refuse, he cannot assign---3 Bac. abr. 42.

But an executor having once qualified, cannot divest himself of the office---The court will not discharge him.---I Hill's Ch. (So. Car.) R. 61---see Toll. 40.

After probate of will, (in No. Carolina,) executor can only renounce with permission of court---I Iredell, 298.

In Mississippi, it is provided, that "on application of any person, to whom letters testamentary or of administration may have been granted, it shall be lawful for the probate court of the proper county to permit such person or persons to surrender his, her or their executorship, or administration, by giving sixty days notice by advertisement at the door of the court-house, and by publishing the same in some newspaper of this State, for such time as the court may consider necessary, and settling with the court so far as his, her, or their administration may have extended.—And the said court shall make such allowance to such person or persons as they may deem right and proper, according to the stat-

*A. one of three executors, and indebted to the testator at the time of making his will, by simple contract, refused to act, and the other two executors proved the will and administered. A. afterwards gave a bond to the two acting executors for the debt from him to the estate—and more than a year afterwards took on himself the office of executor, and cancelled the bond—*Held*, the bond was given to the two executors for a valuable consideration, as private individuals, the addition of executors, &c. being merely words of description, and that A. could not avail himself of the privilege of executor as to the debt, and that the other executors might recover of him the amount of the destroyed bond. 19 John. R. 188.

ute in such cases made and provided—*unless* it should appear to the court that injury would result to those interested in said estate—and to re-grant letters testamentary or of administration to such person or persons as may be entitled to the same. How. & H. 547, act 1822.*

The removal of an executor from the State where he qualified, is not a discharge of him from his liabilities—14 Peters, 166—much less does it discharge him from liability for assets received by him and paid over to his co-executor. *Ibid.*

EXECUTOR---HIS INTEREST IN TESTATOR'S GOODS.

§ 9. An executor has the title to the goods of his testator before actual possession, and so has an administrator—and either may maintain *trover*, trespass, &c. 1 Com. dig. adm'r. B. 10.

And though the executor does not prove the will for a long time, after the testator's death, the property vests in him immediately—9 Wend. 302; 2 Hill, 181. So, though administration be not granted for a long time, it vests the property in the administrator by relation, from the death of the intestate. *Ibid.* See also 4 Conn. R. 347; 4 ib. 182.

At common law, the appointment of an executor vests the whole personal estate of the testator in him, as trustee for the purposes of the will; and he holds the legal title in all the chattels of the deceased; and for the purpose of administration is as much the proprietor, as was the testator. 14 Peters, 33; 2 B. Mon. 226.

Executors in England took the unbequeathed surplus, where there was no distributee, under a presumption, that it was the intention of the testator that he should have it;—when this presumption was removed by a bequest to the executor, the residuum belonged to the king as trustee for his subjects. 1 B. Monroe, 396-7.

An administrator never acquired any beneficial title to an intestate's effects in consequence of a failure of distributees. He was only a trustee, and held in such case, for the benefit of the king, who was entitled by virtue of his prerogative. *Ibid.*

* In Pennsylvania, the court will not dismiss an executor or administrator on his petition to be discharged from his duties, without first appointing auditors to ascertain the facts, although he swears he never received any money, nor did any act as administrator. 1 Browne's R. 289.

Administrators of those dying without distributees, are liable to the commonwealth for the property, or the value thereof, which came to their hands, and the sureties are liable to the same extent, without regard to the lapse of time. *Ibid.* 400.

§ 10. A term for years vests in the executor or administrator, and though worthless, he cannot refuse it. 1 Salk. 299; 1 Vent. 271.

An executor as such, has a right to enter goods belonging to his testator at the custom-house---3 Mason, 126. An executor is not entitled to a lapsed legacy, nor a surplus undisposed of. 2 Hayw. 486.

An executor or administrator alone can represent the personality—and he alone can give a valid discharge on payment of the demand due to the testator or intestate. 4 Paige, 47; 2 B. Monroe, 226.

Whatever property or money is lawfully received by an executor or administrator, after the death of the testator or intestate, in virtue of his representative capacity, he holds as assets of the estate, and is liable therefor to the party entitled thereto. The knowledge or want of knowledge by an administrator of the rights of persons so entitled, does not affect them. 14 Peters, 282.

An executor who is also trustee, will be considered as holding the property as executor, and not as trustee. 9 Pick. 395.

So, an executor or administrator represents the person of the deceased---Co. Litt. 209---And he is assignee in law, of *choses* in action, &c. of his testator or intestate. 1 Com. dig. adm'r. B. 11.

But he cannot bind his intestate's estate by contract express or implied. 2 Bailey's So. Car. 317.

He may have the rights and must perform the conditions of his decedent's contracts---1 Com. dig. adm'r. B. 11---unless the duty or right be personal to him only. *Ibid.*

The same actions the testator or intestate might have had, his executor or administrator shall have. Swinb. part 6, sec. 2.*

*By act of Mississippi, "all actions commenced by or against a deceased during his life, (except actions for slander, and for torts done to the person.) are declared to survive to the executor—for and against administrators with the like effect, as if had or maintained for or against testator or intestate. How. & H. sec. 95, 414.

When K. subscribes to a work to be published in numbers and dies, and publisher dies before completion of the work, and his administratrix afterwards completes it and sends the numbers to K., he is bound to pay for the numbers so delivered, after the intestate's death. 11 John. R. 74.

§ 11. None but the executor or administrator can maintain an action for claims due to the deceased---I M'Cord's Ch. R. 148.*—Only fraud or collusion, &c. can authorize a legatee to sue for debts due to the deceased. 2 ib. 514.

The owner of property or money received by him, may resort to him in his personal or representative character, at his election. If he received it as executor, he may be sued as such—and shall not be allowed to throw off that capacity so as to defeat the owner's action. 14 Peters, 282.

An agreement of an administrator with an Ordinary to leave the management of an estate with a third person, is no bar to an action by an administrator, against such person for money of the estate in his hands, although the Ordinary has forbidden him to pay the money over to the administrator. I Bailey's So. Car. Ch. R. 206.

In an action by an administrator for the conversion of the goods of his intestate after his death, he sues in his individual and not his representative capacity; and his administration forms part of the title and must be proved, though the defendant has not craved oyer or pleaded *ne unq. adm'r.*---2 Bailey's R. 174; 4 Hill, (N. Y.) 57.

EXECUTOR'S INTEREST, BEFORE PROBATE.

§ 12. An executor's interest is completely vested at the testator's death, and he may therefore perform almost every act incident to his office, before probate of the will. Toller, 44; I Com. Digest, adm'r. B. 9; 1 T. R. 480.†

*When legatees have received their portions before debts have been paid, a creditor may file his bill against both the executor and legatees, for an account. The general principle that executors must first account, has its exceptions.—2 M'Cord's Ch. R. 430.

† In Mississippi, no executor or administrator is allowed to take himself or sell at private sale, any part of the estate, except where directed by the will, or by legislature.—H. & H. sec. 86, p. 411. They may sell crop of cotton or corn by order of the court.—Ibid. sec. 63 & 107, p. 403.

He may commence suit in right of his testator, but he cannot declare before probate, because he must make profert of his letters testamentary, but when produced they shall relate back to the time of suing out the writ---Toller, 46---even if obtained at any time before hearing.—*Ibid.* citing 3 Bac. abr. 53—See also Vent. 370. It is sufficient if the probate appears on the declaration. Com. dig. adm. B. 9; 3 P. Wms. 349.

But it is not so with an administrator, whose authority dates only from grant of his letters. I Salk. 303.

He may also sue in his own right, before probate, for goods taken after the testator's death---Toll. 47---even though the goods have never been in the executor's possession. *Ibid.**

In Virginia, it has been decided that an executor being required to qualify by giving bond with surety, before acting, a sale of the testator's goods made by one of the executors *not* having so qualified, would be void against an executor who had given bond—though the sale was made for a valuable consideration, and at a time when there was no qualified executor. 4 Munf. 104, 194.

In Mississippi, the statute (How. & H. p. 390) also requires a similar bond of the executor, and the effect would be the same. It may be therefore laid down, that the acts of an executor to whom letters testamentary have not been granted, are invalid.—See 16 Wend. 579. But see 7 How. 150.

*A woman and another person were executors. The woman married—her husband did not alter the property of the testator's goods—the wife died:—*Held*, the other executor might sue the husband in detinue for the goods. Swinb. part 6, sec. 2.

CHAPTER XXXI.

EXECUTOR—*de son tort*.

§ 1. Before further enquiry respecting lawful executors and administrators, it seems to be appropriate first to ascertain the nature of what the law denominates an *Executor de son tort*.—For it is only before a lawful executor or administrator has qualified, that any person can constitute himself such, by tortiously intermeddling with the goods of a decedent—Toller, 40—After such appointment, he is regarded only as a *trespasser*.—*Ibid.*—12 Connect. 212. The reason is, that all the assets can be rendered available by a resort to the proper executor or administrator. *Ibid.*

§ 2. An executor *de son tort*, then, is one who, (before the appointment of an executor or administrator,) and without any authority from the testator, assumes the office of executor or administrator, by his own intrusion and interference—Toll. 35—and this though he may have been appointed executor in another State, and received assets there, which he brought into this State, and collected debts of decedent here. 7 Cowen, 64.

Various acts constitute one an executor *de son tort*, which, however, may all be briefly summed up, in the act of intermeddling with the goods of a deceased person, without any authority so to do—Toller, 38; 3 Penn'a. R. 129; 7 S. & R. 196—and examples there cited.

Where there is neither a will, nor an administrator, nor representation of insolvency, the intermeddling of a stranger with the goods of the decedent, by taking and claiming them, will constitute him *executor de son tort*.—12 Connt. 212. Any intermeddling by a stranger will make him liable to strangers, so far as assets have come to his hands. 2 M'Cord, 516; 3 Penn'a. R. 129; 4 Mass. 654; 7 Cowen, 64.

If A.'s servant collect money of C. an intestate, by authority from C. in his life-time, and pay the same to A., the latter is liable

as *executor de son tort*, if he do not pay over the money to C.'s representative. Toll. 39.

If collector, appointed by the Ordinary, exceeds his authority, and sell any of the goods, even such as are perishable, he becomes an *executor de son tort*, even if he had the express order of the Ordinary so to do, the same being illegal. Toller, 38.*

A man may be charged as *executor de son tort*, in respect to goods which he has in possession, by an assignment or conveyance from the deceased, if such assignment or conveyance be tainted either with moral or legal fraud. 3 Penn'a. R. 129; 6 Yerg. 221; 7 John. 161.

But one setting up a fraudulent claim to goods, does not thereby make himself *executor de son tort*, though he may thereby injure the estate. 6 Yerg. 221.†

A widow undertook, after her husband's death, to dispose of his chattels, and sold part to the defendant, who gave his note for them to her. He afterwards became administrator of her deceased husband.—*Held*: she could not recover the amount of the note from him, she having acted as *executor de son tort*, and there being no evidence of any rightful payments made by her on account of the estate. 10 Watts, 287.

I. being in debt, and O. being his surety, I. conveyed property to O. to secure him, and delivered it to O., with verbal authority to sell, in case he became liable. I. died, and O. having been rendered liable and paid I.'s debt, sold the property to indemnify himself; H., a creditor of I., sued O. as *executor de son tort* of I.: *Held*, that O. was not thereby made such executor. 2 Sm. & M. 728.

*By act of Mississippi, Courts of Probate may authorize administrators *ad colligendum*, to sell, immediately after the appraisement, such goods as are perishable or not to be preserved. How. & H. sec. 26, p. 393.

†By act of Mississippi, "if any one aliene or embezzle any of the goods and chattels of a decedent before taking out letters of administration or testamentary and exhibiting a true inventory of all the decedent's estate, he shall be liable as *executor de son tort*.—How. & H. sec. 97, p. 415. Query?—Cannot a *lawful* executor, who has not "returned an inventory," render himself an *executor de son tort* under this act, by either "aliening or embezzling" the goods and chattels of the decedent?

O. having received property from I., to indemnify O. from loss by securities for I., with power to sell in case of loss. I. died; no administration on his estate was taken out. O. sold, in accordance with the power, and after having paid off his liabilities for I. had a surplus of the proceeds on hand: *Held*, in a suit against O., charging him with being executor *de son tort* of I., that the fact of the surplus money belonging to I., in the hands of O., at the time of suit, was not evidence of his being executor *de son tort*, there being no representative of I. to receive the money.—*Ibid*.

It is competent for a person, sued as an executor *de son tort*, to prove that a surplus fund remaining in his hand, after a sale of the property conveyed to him by his alleged testator, to indemnify him for liabilities, and the payment of those liabilities, was by the alleged testator in his life-time, ordered to be paid to other persons than the plaintiff in the suit, and to that end to introduce in evidence to the jury a deed of trust, between the alleged testator and said other persons. *Ibid*.

§ 3. But there are many acts of kindness and charity which one may perform without being implicated as executor *de son tort*, such as, preserving goods under lock, defraying funeral expenses, making inventory, providing for decedent's family, &c. Toller, 39, 40; 12 Connt. 212.

What constitutes an executor *de son tort*, is a question of law for the court, and not of fact for the jury. 7 S. & R. 192.

§ 4. No intermeddling with land will make one an executor *de son tort*, it being a wrong to the heir---4 Mass. 659. Therefore lands of a decedent cannot be sold under a judgment against one as executor *de son tort*---4 Mass. 659, 7 S. & R. 192; 10 ib. 144. But to raise an *equity* in the purchaser under the judgment, proof is admissible in ejectment against him for the land, that the heirs of the testator stood by and saw the defendant take possession, make improvements, &c.---10 S. & R. 144.

And although one may become executor *de son tort*, of a term or lease, actually existing, yet a general entry on land of which there is no term existing, makes him disseizor in fee, and not executor *de son tort*. Toller, 40.

§ 5. Intermeddling makes an executor *de son tort*, though he may afterwards qualify as administrator, but he may then retain—6 Yerg. 221; 15 Mass. 322; 8 John. 126. But if he claims under a grant of letters void as to creditors, he will still be executor *de son tort*. *Ibid*.

Taking out letters of administration, will legalize acts before tortious—8 John. R. 126; 1 Hill's Ch. R. 33. And intermediate judgments against him, without fraud or collusion, will be good against him as legal administrator. *Ibid*.

And he may by taking letters of administration, legalize his former acts, even *after* the commencement of a suit against him—15 Mass. 322, 325; 8 John. R. 126—but not so as to affect such suit.—*Ibid*. And, if another has taken out administration, then the executor *de son tort* must have delivered over the goods to the rightful administrator, before action *commenced*, in order to be discharged from the action. *Ibid*. 335.

Where a widow receives payment of notes belonging to her husband's estate, and subsequently united with another in letters of administration, and they then sued on the note—*Held*, notwithstanding the statute respecting executors *de son tort*, the letters related back to the time of the intestate's death, and therefore payment to the widow was a bar to the action, 2 Hill, 225.

§ 6. An executor *de son tort*, having no legal control over the estate of a deceased person, and no authority to collect his effects, and his interference being unlawful,—if when sued, he falsely denies that he is an executor, he is made chargeable, by his false plea, for the debt, out of his own estate, if he have not personal estate of the deceased sufficient to pay it. 4 Mass. 654, 658; 1 Hill's Ch. R. 167; 4 B. Monroe, 140; 7 Cowen, 64.

In South-Carolina, an executor *de son tort*, may plead *plene administravit*, but cannot retain, though his claim be of greater dignity—1 Bailey's R. 42: 9 Yerg. 450—unless he afterwards qualifies as administrator. 6 Yerg. 221.

Though an executor *de son tort* cannot plead payment of debts in bar of an action by the rightful administrator or representative, yet he may, under the general issue in trover, give such payments in evidence in mitigation of damages—4 Watts, 432. But en-

tries in the day-book of an executor *de son tort*, are not admissible as evidence of debts of the decedent paid by him. *Ibid.*

An executor *de son tort* may discharge himself against the rightful administrator by proving debts paid to the amount of the goods received and belonging to the deceased---9 Mass. 74. But some doubt was expressed in this case, whether he would not be liable for goods still in his custody. *Ibid.* 77.

But, it seems, if executor *de son tort*, sell the property and pay the debts, the rightful administrator or executor cannot disturb the purchaser; but if not to pay debts, he transfers nothing. 2 Haywood, 375.

§ 7. An executor *de son tort* is not liable to the distributees on a petition filed by them against him, as, rightful executor; for if a decree be rendered in favor of petitioners, and they receive the property, they thereby become themselves executors *de son tort*, and a court of Equity will not become accessory to such an act, or so far disregard the rights of creditors. 2 Murph. 335.

An executor *de son tort* is liable to the action of the lawful executor or administrator, or of a creditor. If there be a lawful executor, they may be joined in an action by the creditor, or sued separately. 3 Penn'a. R. 130.

An executor *de son tort* is liable only to the extent of the value of the assets which came to his hands. He may protect himself as the rightful executor by plea. *Ibid.*

The act of 1789, (S. Car.) which protects executors and administrators from suit, until nine months after the death of the testator or intestate, does not apply to executors *de son tort*. 1 Hill's Ch. R. 50.

§ 8. The laws of Ohio do not recognize an executor *de son tort*. 5 Ohio R. 533.

The laws of New-Hampshire do.—2 N. H. 475, 477.—So of Massachusetts---4 Mass. 654; 15 ib. 322, 325—and of Connecticut---1 Root, 104—So of New-York---7 John. 161; 8 ib. 97; 7 Cowen, 34—And of Pennsylvania---7 S. & R. 192; 3 Penn. 129;—And of Maryland---2 Gill. & John. 493; 6 Har. & John. 61—So of Virginia---1 Tucker's Comm. 399; 2 Rand. 297—And of South-Carolina---2 M'Cord, 516; 4 ib. 285; 1 ib. 107—So of North-Car-

olina--2 Hayw. 373—So of Tennessee--6 Yerger—And of Mississippi---see note to sec. 2, *ante*.

CHAPTER XXXII.

EXECUTOR-----HOW QUALIFIED.

§ 1. In England, the jurisdiction of probating wills belongs to the Bishop of the diocese, in which the testator resided at the time of his death. This general rule is subject to a few exceptions, founded on local usage. Toll. 50.

If all the effects lie in one diocese, the executor ought to appear before the Bishop, or his surrogate, and prove the will.

If there be *bona notabilia*, in different dioceses, within the same province, the will must be proved before the metropolitan—but if in two provinces, the Archbishop of each shall grant probate within his respective province.

If in two different dioceses of one province, and in one diocese of the other province, in respect to the former the Archbishop shall have jurisdiction—in respect to the latter, the Bishop of the diocese.

So, if the testator, not *in itinere*, die in one province, leaving *bona notabilia* in another, the Archbishop shall have jurisdiction.

And if a man have two houses in different dioceses, and resides chiefly at one, but sometimes goes to the other, and being at the latter for a day or two, dies, leaving no *bona notabilia* in the first mentioned house, probate shall be granted where he died, for he was commorant there, and not *in itinere*. Toll. 51, 52.

If there be *bona notabilia* in England and Ireland, several probates shall be granted by the Archbishop or Bishop of England, or of Ireland, as the case may require. Toll. 53.

§ 2. The law of England, as laid down in the preceding section, though useful as affording, by analogy, a rule for the interpretation of legislative acts of this country, on the same subject, has necessarily undergone much alteration in the different States, while at the same time its identity has been sufficiently preserved to render many decisions in relation to it, applicable to our own system.

§ 3. In Mississippi, it is enacted that the probate of wills shall be granted by the Judge of Probates, according to the rules laid down in sec. 5, ch. 28, p. 200, *ante*.

It is further enacted, that on the exhibition of any will, "the court having jurisdiction as aforesaid," may grant letters testamentary. How. & H. ch. 33, sec. 17, p. 389.

And further, that "before granting any letters testamentary, &c. the executor or administrator shall execute a bond with such security as shall be approved by the court, in a penalty equal to the full value of the estate; and also, to take an oath," &c. (For form of bond and oath, see How. & H. sec. 20, p. 390.)

And further, executors shall not be compelled by the court, to give security, if exempted by the will itself. How. & H. sec. 21, p. 391. But if the court see, or creditors suggest cause to suspect the executors of fraud, or that the personal estate will not be sufficient to pay the debts of the deceased, the courts may and should, even then, require a bond with security. How. & H. sect. 21, p. 391.

And further, it is required, that where letters testamentary shall have been granted as aforesaid, publication thereof, once a week, for six successive weeks, shall be made within two months after the grant of the letters, giving notice to all persons having claims against the estate of the testator, to exhibit the same within the time limited by law, or the same shall be forever void.—How. & H. sec. 92, p. 414.

And no letters testamentary shall be granted till after the expiration of fourteen days from the death of the testator or testatrix, nor till the widow if any, and next of kin, if resident in the State, have been summoned to contest the same, if proper. How. & H. sec. 8, p. 389.

The provisions of the will mark out the duties of an executor—6 Halst. 145; Cox, 210—Any deviation is illegal. *Ibid.*

As all the decisions on the subject of the foregoing chapter, are equally applicable to administrators, they will fall under the latter head in the next chapter.

CHAPTER XXXIII.

ADMINISTRATOR---WHEN AND HOW APPOINTED.

§ 1. Administrators may be appointed—

1st. Where no executors are named in a will:

2d. Where all the executors named in the will refuse the executorship—or,

3d. Where they renounce the same—or,

4th. Being required to give security, shall all refuse or fail so to do—or,

5th. Where the executor named is disqualified---How. & H. sec. 14, p. 388---sec. 18, 389---sec. 22, 391—or,

6th. Where letters testamentary are superseded---Sec. 44, 397---sec. 45, 46, 47, 48, p. 397, 399—or,

7th. During any contest about a will, or during the infancy or in the absence of executor or executors, or until a will which may have once existed but is destroyed, can be established---How. & H. sec. 24, 392. For form of letters, bond, and oath, in this last case; see---*Ibid.*

All these will be severally spoken of hereafter.

§ 2. At common law, no person had a right to administer, but the Ordinary could grant administration to whom he pleased, till the statute gave it to the next of kin. Perk. 525; Toml. law Dicty. 201. The right to administer is statutory. It belonged to the king as *parens patriæ*, through his county courts, till statute 31st Edward III. required their appointment by the Ordinary, and made them accountable as executors. 1 B. Monroe, 396.

§ 3. So long as a qualified executor is capable of exercising his authority, it cannot be conferred with or without limitation, by the Ordinary, on any other person.—8 Cranch. 9. Where there is an executor with power not limited by the will, a grant of administration is void.—3 Dana, 130. So, a grant of administration during the absence of an executor under no disability is void, being only an appointment of an agent to the executor, which only the executor can do.—8 Cranch. 9.—(But see *ante* sec. 1, paragraph 7, which authorizes the appointment of an adm'r. during the absence of the executor.)

So letters of general administration, *pendente lite*, about the validity of a will, is void, and the letters are not even good as letters *pendente lite*. 3 Iredell, 557.

§ 4. If administration be given by the wrong court, it is void; if to the wrong person, it is only voidable—and his acts are valid. 4 Yerg. 16. But if one be appointed administrator, while there is a lawful executor, his acts are void.—*Ib.*—3 Dana, 130.

And, if there be a will, which is concealed, and an administrator be appointed, his acts are good and valid. In this respect the English law prevails—5 Pick. 201; Taylor's N. Car. R. 105—(see also How. & H. 395)—14 Peters, 33; 1 Hill's Ch. R. 461—even though the suppression of the will was obtained by fraud.

When a will is produced, the administrator and his sureties are liable by the condition of their bond, to those entitled to legacies under the will. 9 Dana, 90.

§ 5. If administration is granted on the estate of a person not really deceased, the act is void—8 Cranch. 9. For, to give jurisdiction to the Court of Probates, a case must be brought before him, in which, by law, letters of administration may issue.—*Ibid.* See sec. 8, *post*.

§ 6. The cases in which administration has been granted notwithstanding the will, are cases in which it is not apparent that there is any other person possessing the right, or cases in which that person is disqualified from acting. As, where administration is granted pending a controversy respecting a will; and it is not certain that there is a will or not. 8 Cranch. 9.

If administration be granted during minority of the executor, it is because the executor is legally disqualified from acting, and indeed has not taken and could not take on himself the trust.—He may, when of age, reject all the right and powers conferred by the will, and consequently his interest is not a vested interest. *Ibid.* In the case of an absent executor not qualified, and who is not able to act, the Ordinary may appoint an administrator *durante absentia*.—But otherwise, if such executor has proved the will. *Ibid.*

§ 7. The power of granting letters of administration, and hearing and determining the right to the same, shall pertain to the Orphan's court (court of Probates,) of the county, where

1st. The intestate had, at the time of his death, a known place of residence, or a mansion-house.

2d. If he or she had no such place of residence, then where intestate died, or where his or her estate, or the greater part thereof, shall be. How. & H. sec. 35, p. 395.

Where the deceased had no fixed place of residence, administration is properly granted by the Judge of the county where he died.—2 Dev. 73. In North-Carolina, the county courts have power to grant administration of the effects of persons who resided and died in another State. 1 Iredell, 345—(see *ante* 211.)

The right to a distributive share constitutes such *bona notabilia*, as will entitle the court of the county where the share is, to grant administration. 1 Iredell, 345.

§ 8. Grant of administration by a judge having no jurisdiction is void, even though no exception be taken thereto. 21 Pick. 101. See sec. 4.

So, where there is a grant of special administration by a judge who is interested—22 Pick. 507—as by a judge having a claim against the estate, even though the judge did not intend to enforce

it—21 Pick. 101—otherwise, if he relinquish his demand.—5 Pick. 483.

The grant of original administration, made twenty years after the death of the intestate, is void. 2 Mass. 120; 5 Pick. 20.

A grant of administration originally void, and not merely voidable, can acquire no validity from an acquiescence of twenty years, or any longer period—5 Pick. 20—And acts *in pais* are admissible as evidence to show acts to be void. 9 Pick. 239—see sec. 5, *ante*.

§ 9. In granting such letters, the court shall prefer—

1st. The husband or wife:*

2d. Such as are next entitled to distribution, or one or more of them, as will best manage the estate.

3d. If no such person apply within sixty days from the death of the intestate, or at the next succeeding court after the expiration thereof, to any creditor or creditors who apply for the same, or to any other person the court in their discretion think fit. How. & H. sec. 35, 395.

Where the court grants administration, it is *prima facie* evidence of right.—3 Humph. 142. Letters are properly granted on appearance of next of kin.—*Ibid*. Such appearance is a waiver of citation. *Ibid*.

If administration is granted when next of kin is out of the county, it shall be *durante absentia*. 1 Hayw. 220.

The next of kin residing abroad, may designate an administrator. 1 Iredell, 345.

The Surrogate has discretion to grant administration to any one of the next of kin to the exclusion of all the rest. 2 C. C. E. 143, Taylor *vs.* Delancey.

Between brothers, the court will grant administration to the one most interested in faithfully executing it. 1 Dev. 352.

The court should not grant administration to any not named in the act, till those designated shall refuse—I Hayw. 220—and if he does, the grant is void, and the court should revoke it.—*Ib*.

*In Kentucky, a widow residing out of the State, bars her claim to administration. 5 Dana's R.

2 Hill's Ch. R. 503; 19 Pick. 336. And when there are none such as are designated in the act, (or they do not appear within the limited time,) the Ordinary alone can grant letters ad colligendum. *Ibid.*

If administration cannot be granted to next of kin, owing to some incapacity, it shall be to next after him qualified to act, and the creditor be postponed—if any of them apply within the time prescribed by law. 2 Murphy, 268.

A motion to revoke letters of administration, on the ground that the administrator is not next of kin, can be made only at the instance of the next of kin. 1 How. 322.

By the statute of this State, Mississippi, the husband or wife, and where there is no husband or wife, the next of kin, has a right to the administration of the estate of the deceased, *unless* under twenty-one years of age, of unsound mind, incapable according to law of making a contract, or a convict of some crime rendering him infamous---3 How. 40. As regards others, appointment is a matter within the sound discretion of the court---1 How. 568. The court may join a discreet person with the widow or husband---4 Mass. 348;* 5 J. J. Marsh. 210.

If the person entitled to distribution be a minor, the Probate court may appoint an administrator, during his minority. 5 How. 288; 1 Hayw. 220.

When the nearest of kin are subjects of and resident in a hostile country, administration should be granted to the next of kin in this State---2 Murph. 268; 1 Car. L. R. 247---but if resident within the State, an alien enemy may act, by the permission of the proper authority. *Ibid.*

The county court has power to revoke letters of administration during the same term, and to grant them to another. 1 Dev. 352.

§ 10. In a common case of intestacy, the Ordinary must grant administration to some person, and though he should grant it to one not legally entitled by law, the act is binding, till annulled

*Administration should be granted to a daughter in preference to the son of the eldest son of the intestate. 1 Root, 52.

A distributee will be preferred to a creditor when they apply together.--2 Leigh, 267. Between persons equally entitled, the Court may select.--2 Caine's Cases, 143.

by the competent authority---8 Cranch. 9---but if granted in the wrong county, it would be void. (Note the distinction, and see *ante* page 234, sec. 4.)

§ 11. *Before* granting such administration, the administrator shall take the following oath, viz:

1st. If there be no executor, "that the deceased died without a will," &c.—How. & H. sec. 37, p. 396.

2d. In case the executor renounce, in which case administration, with the will annexed, will be granted—"that the writing contains the true last will and testament of (————) as far as he knows and believes," &c.—How. & H. sec. 20, p. 390.—And where the executor is removed, the oath shall be the same, except that the words "not already administered," shall be inserted in the proper places.—Sec. 44, p. 398.

And he shall also execute a bond as follows:—In the *first* case above stated, the bond shall be as prescribed in How. & H. sec. 37, p. 396—and in the second case above stated, it shall be as in How. & H. sec. 20, p. 390, and sec. 44, 398.

For bond of administrator ad colligendum, see that head, *post*.

CHAPTER XXXIV.

BOND OF EXECUTORS AND ADMINISTRATORS.

§ 1. In Kentucky, an administrator's bond should be payable to the Commonwealth, but it is not void, if the justices of the county court by their names, are obligees. I Dana, 514—see *post*. sec. 7.

A defective bond does not vitiate the acts of the administrator. 9 Dana, 102.

But the office of the administrator is not complete, till a bond is given.—4 Humph. 79. (So, as to executor under the act, in

Mississippi—See *ante* sec. 12, p. 225.) But if an administrator, after his appointment, proceed to settle the estate, and the next of kin after five years, applies for letters, his petition, if the administrator will then execute a bond, shall be dismissed. 4 Humph. 79.

In North-Carolina, the giving a bond is not a condition precedent to the appointment of an administrator; and although an administrator and sureties sign a *blank* bond, the acts of the administrator are valid, till the revocation of his letters.—4 Dev. 225; 2 ib. 360. A grant of administration to A. on B.'s estate, A. giving bond, is unconditional—2 Dev. 360. Letters of administration are only a certified copy of minutes, under the seal of court. 2 ib. 360.*

An administrator local, as well as domiciliary, is himself liable, independently of his bond, for all assets received by him. 7 Dana, 553.

§ 2. Where an administration bond is joint, one administrator is liable for the acts of his co-administrator—2 Brock. C. C. R. 159—and for the whole—Ib. 403. But unless such co-administrator or his representatives be before the court, the report of such balance cannot affect him—Ib. 403. One executor is not liable for the *devastavit* of his co-executor. 10 Peters, 532; 2 Bailey's So. Car. R. 403,

The result of the cases seems to be, that where, by act done by an executor, any part of the estate comes to the hands of the co-executor, the former will be responsible for the latter—in like manner as for a stranger—whom he had enabled to receive it, and there is no distinction as respects their liabilities, between creditors and legatees—2 Hill's Ch. R. 293. Thus, an executor, who applies to the Ordinary for and obtains an order of sale, and returns the sale bill, will be held liable for the amount of such sale, though his co-executor assisted him in the sale, and received part of the money. 2 Hill's Ch. R. 295—Cook *vs.* Cook, Oct. term, N. Jersey, 1824.

Administrators or executors on joint bond, are liable to indemnify the sureties on default of one of them. 2 Connt. 536.

*The bond of an executor, administrator, &c. must be recorded, and a certified copy shall be evidence. How. & H. sec. 37, p. 395, 396.

§ 3. An executor's or administrator's bond binds the sureties, for a faithful performance of the *legal* obligation of the executor and *no more*—i. e. to a faithful administration of the goods and chattels of the testator or intestate, and payment and distribution of all legacies. But as executors and administrators have no concern with *devises*, the sureties incur no responsibility as respects them. 7 Dana, 10. Where the condition of the bond was, "faithfully to administer," it was *held*, not to bind the sureties for distribution. 7 Dana, 417. And sureties are not liable for a slave which did not pass by the will, but was sold by the executor, unless the condition of the bond is for distribution as well as for legacies. *Ib.*

The sureties of an executor or administrator are not liable on the bond of their principal, for the proceeds of real estate of the testator or intestate, sold by an order of the Probate court---17 S. & R. 392---because the bond refers only to chattels. *Ib.* (But in Pennsylvania, the statute authorises the judge in such case, to take a bond with separate sureties for the faithful performance of a power to sell. *Ib.*)—See also 11 S. & R. 441; 8 Watts, 214; 5 Watts, 157.

A bond given by decedent as Commissioner in Chancery to sell land of heirs, imposes no duty on his representatives (administrators,) nor do the decrees in the case. If there was no breach by him during life, there could be none by *them* after his death. 7 Dana, 303.

Where a will is produced after a grant of administration, the sureties on the bond of the administrator, are liable to those entitled to legacies under the will. 9 Dana, 90.

§ 4. Sureties are not liable for funds received by the executor, as agent or trustee for the legatee, though charged in the account. 7 Dana, 10.

By act of Mississippi, no executor's or administrator's sureties shall be rendered liable, beyond the assets of the testator or intestate, by reason of any omission or mistake in pleading—or false pleading of such administrator. How. & H. sec. 38, p. 396.

A bond binds the sureties for every thing which came to the hands of their principal, in which the intestate had an interest---8 Ohio R. 220---but only such as were his at *the time of his death*. 11 S. & R. 441.

§ 5. But the bond of the executor or administrator only covers assets received here. 3 Iredell, 152.

Bonds by executors in this State, who have taken out letters, with the will annexed, in another State, subjects sureties only to the liabilities of a local administrator, being limited to assets received by him in this State. 7 Dana, 351.

BOND---BREACH OF.

§ 6. Creditors may assign non-payment of debts and legacies as a breach of the bond of an executor or administrator---1 Dev. 475---And the criterion of damages is the amount of the judgment against the executor or administrator.—*Ib.* & 5 Connt. 373. In case of insolvent estates, the rule of damages will be the *average* to which each is entitled---*Ibid.*—and one breach is sufficient. 9 S. & R. 63.

Where an administrator was warranted, and judgment rendered against him for debt and costs, on plea of retainer, fully administered, &c.—*Held*, that the justice could try the cause on these pleas; and having negatived them, their judgment was absolute, and *non-payment* thereof assignable as a breach of the bond of the administrator. 3 Dev. 91.

But where a judgment is void, a non-payment of it, cannot be alleged as a breach by which to render the administrator and his sureties liable.---1 Green's Ch. R. 133. Not citing the administrators, is a good equitable defence to a scire facias on a judgment for penalty, but not in a suit on the bond itself. 9 S. & R. 63.

Where the condition of the bond was that the administrator should exhibit an inventory to court, by 14th June, 1821, and he did not exhibit it till the 13th August next succeeding,—*held*, this was a breach of the condition, though appraisers were not appointed till the 9th day of July, 1821; and the inventory, when presented, was accepted by the court---5 Connt. 373; 8 S. & R. 128—Such inventory need not be final. *Ibid.*

So, where the condition was he should render an account by the 14th November, 1821, and he did not till May, 1823—*held*, this was a breach, though the estate was represented insolvent; and commissioners appointed in August, 1821, who reported in March, 1822, and an order for sale of real estate was passed Nov.

11, 1822—and the administrator's acceptance of his doings was under this order, was made and accepted January 13th, 1823—and though the account when rendered was accepted by the court. 5 Connt. 373.

Where the condition of a bond is not strictly impossible at the time of executing it, nor afterwards made so by act of God, of the law, or the obligee, the omission to perform it is an absolute and unexplainable breach. *Ibid.*

Where the same person is administrator and guardian of next of kin, and retains an account of his administration, and acknowledges a balance due to his ward, this is not a fulfilment of his administration bond, unless money is identified and retained by guardian to pay his ward. 6 Yerger, 434.

BOND—ACTION ON.

§ 7. An action can be maintained on an administration bond against the sureties, before judgment against the administrators. It lies against the sureties as soon as the administrator forfeits his bond, and any person is "thereby injured." (By statute of N. C.) 2 Murphy, 22.

The heir cannot sue on an administration bond till the administrator has settled his accounts, or the plaintiff's right is established by judgment. 3 Ohio R. 226.

In assigning a breach, in a suit on an administrator's bond, it is not necessary, in order to establish a *devastavit*, to state the kind and quantity of goods and chattels which came to the hands of the administrator. It is sufficient to aver that goods and chattels, sufficient to pay the debt, came into his hands, and that he wasted and converted the same to his own use. 6 How. 93. But even this is unnecessary, where the value of the estate is stated in the breach. *Ibid.*

One administrator cannot maintain an action against the representative of a deceased co-administrator and co-obligor, on the administration bond. 4 Watts, 384.

§ 8. The act of Mississippi, provides that "such bond shall be payable to the Judge of Probate of the proper county, and his successor in office, and shall not become void on the first recovery, but may be put in suit and prosecuted from time to time by

and at the cost of any party injured by a breach thereof, till the whole penalty be recovered thereon; and such bond shall be recorded in the office of the Register of the Orphan's court, (now Clerk of Probates,) and a certified copy thereof, under the seal of said court, shall be received as evidence in any court of law and equity in this State. How. & H. sec. 20, p. 391.

And "if a bond of executor or administrator be forfeited, the Judge of Probate may cause the same to be prosecuted, at the request of any party grieved by such forfeiture, and the money recovered shall be applied to make good the damages sustained, in such manner as the court of Probates shall direct in their decree." How. & H. sec. 39, p. 396.

And "executors or administrators are suable for *devastavit*, for debt on bond, jointly and severally, or by *scire facias* against the principal and sureties in bond, till the whole penalty is recovered—and then by *scire facias* against the executor or administrator." How. & H. sec. 111, p. 417. By act of 1830, "any person interested in the estate of any deceased person, as creditor or otherwise, may sue, on such bond, the executors or administrators and their sureties, *jointly*, and in no case shall a separate suit be necessary against any executor or administrator, to establish a *devastavit*, prior to the liability of the sureties. How. & H. p. 419, 420.

The pleadings must show that the suit is brought for the use of another, and the character of his interest in the proceeding.—4 How. 680.

The remedy against an administrator, for *past* acts of mal-administration, is on his bond. But where injury to the estate is reasonably apprehended, the Court of Probate may remove the administrator to prevent it. 2 How. 905.

An execution against an executor or administrator may be awarded, *de bonis propriis*, on a *scire facias*, sued out on a judgment previously rendered in proving a *devastavit*. But even in case of there being no defence against the suggestions of the *sci. fa.* judgment final cannot be rendered unless the *devastavit* is proved. 1 How. 271—8 S. & R. 128.

And in a suit on an administrator's bond by a distributee of an estate, on which the intestate of the defendant has administered, the breach must show waste by such deceased administrators, and

a *devastavit* regularly established by proof and judgment, before a remedy can be had of the representatives of such deceased administrator. 6 How. 93.

§ 9. Where a statutory bond contains a condition good in part, and bad in part, and the statute does not declare such bond void, the common law will prevail, and recovery may be had for breach of what is good. Gilpin, 155, 182; 17 Wend. 67: 13 Connt. 75; 15 ib. 152; 2 Maule & Sel. 363; 4 ibid.; 7 Bingh. 423; 3 Dev. 86, 297, 384; 4 ib. 268.

As where A. & B. gave bond to the Court of Probates, the condition of which, (after counting on the appointment of A. and B. as trustees of all the goods and chattels of certain insolvent debtors, assigned for the benefit of all their creditors by deed of April, 1837,) required A. and B. to make a true and perfect inventory of all the goods and chattels of such insolvent debtor, which had come, or should thereafter come into their possession, or possession of some other person for them—should well and truly administer such goods according to law, and render a just and true account of trusteeship in a limited time, it was *held*, that—

1st. This bond taken altogether related only to goods assigned by deed referred to; but if otherwise—

2dly. As the bond did not embrace the terms prescribed by statute, it was valid as to the estate assigned, and void only as to the excess. 15 Connt. 152—see 1 Peters' C. C. R. 47, & 4 W. C. C. R. 620—Gilp. 155.

§ 10. But, if a bond be taken under a statute declaring that it shall be in a prescribed form and no other, a recovery cannot be had if it varies from the statute, or if the condition contains more than the statute requires. Gilpin, 155.

A variance between a statutory bond and the requisitions of the statute is fatal to it, only when the condition would impose a greater burden on him than the law allows. 1 Watts & Serg. 263.

§ 11. The party who first sues and obtains judgment, on an official bond, is entitled to the whole penalty, if the demand amounts to so much, in exclusion of every other claimant.—3 Dall. 501; 4 ib. 106—If claim is less than judgment, *a. sci. fa.* may issue in favor of other legatees, &c.—1 Watts, 374. So, if the party,

first suing, is prevented from obtaining judgment by an order of the court to stay proceedings, on the defendant's paying into court the penalty of the bond.---1 Binn. 370. Where there are subsequent suitors on an official bond, to the same term, they are to be considered as applying at the same time, and the surplus must be distributed *pro rata*.---*Ibid*. But, if instead of suing, any apply to court to come in under first suit, priority of application will entitle to priority of payment. *Ibid*.

CHAPTER XXXV.

EXECUTOR'S AND ADMINISTRATOR'S REVOCATION OF LETTERS.

§ 1. If an executor residing out of the State (or administrator,) when taking the trust, or afterwards removing out of the State, shall refuse or neglect, after due notice from the Orphan's court, to render his accounts and make settlement of such estate with creditors, legatees or heirs, or their legal representatives—or, if any executor or administrator shall become insane, or otherwise incapable of, or evidently unsuitable to discharge the trust reposed in him, the court of Probates may grant letters of administration, *cum testamento annexo*, or otherwise, as the case may require, to such person as may be entitled to the same, and as the court shall deem meet. How. & H. sec. 44, p. 398.

§ 2. And, if letters have been granted without good security, or if the security afterwards become insufficient, the said court, on application of any person interested in the distribution of the said estate, may require other and sufficient security, and in default thereof may revoke such letters and grant administration *de bonis non*. But all acts of such executor or administrator, so removed, done according to law, shall be valid, and all suits, &c. shall be conducted as prescribed by 55th section of this act. How. & H. sec. 45, p. 398. See sec. 7, *post*.

§ 3. When sureties conceive themselves in danger, (or their representatives,) and petition the court for security, the court shall order either counter security, or in default thereof, a new bond with good security; and such bond shall have relation back to the time of granting letters testamentary, or of administration, and be as effectual as if *then* executed.---How. & H. sec. 46, p. 398. On execution of such bond, such sureties shall be discharged from their bond, except only as to such actions as may then be pending against them or their representatives, &c. How. & H. sec. 47, p. 399. If the executor or administrator fail to comply, the court may revoke and annul such letters in part or in whole, and appoint an administrator (in like manner as aforesaid,) *de bonis non*, or place the estate in the hands of the sureties, or some other person, or make other order, essential to the protection of sureties, having due regard to the rights and interests of creditors, legatees or distributees.---How. & H. sec. 48, p. 389. Such surety or other person shall have power to receive and demand debts and other personal property, due or belonging to the estate, to pay debts, and may sue and be sued as executor or administrator.---How. & H. sec. 49, p. 399---See sec. 9.

§ 4. If an executor, administrator, or collector fail, within six months after the date of his letters, to exhibit inventory, or at such other time as the court shall appoint—a summons, returnable within not less than eight, or more than thirty days, may issue against such administrator, executor or collector, to show cause, &c. —and if return be “summoned,” or on two citations, “*non est*,” by the sheriff of the county, where the party resided at the time of obtaining letters, and he does not appear at such return, or appearing does not shew cause, &c., said court may revoke, &c. and grant letters of administration, in same manner as if such executor had not been named in the will, or as if such executor were not in existence. And the power of such executor, &c. shall cease, and he shall deliver up on demand, to his successor, all property, &c. or be suable therefor, &c. How. & H. sec. 64, p. 403.

If one of two executors fail as aforesaid, his power shall cease, unless, within two months, after the return of the citation, he assign to the court a reasonable excuse, &c. How. & H. sec. 65, p. 403.

§ 5. When an executor or administrator, &c. summoned to account, shall fail, the court may attach for disobedience, in like manner as the Circuit court, &c.; and on failure to account, may revoke letters and grant administration to the person entitled thereto, or make such other order as the case may require, having regard to the preservation of the estate, &c. How. & H. sec. 74, p. 407.

§ 6. On application of any person appointed executor or administrator, the court may permit a surrender of letters, by *sixty* days notice by advertisement, at the door of the court-house, and publishing the same in some newspaper of the State, for such time as the court may order, and settling with the court, so far as the administration has extended; and the court shall make such allowance as may be right, &c. (unless it appear that injury would result to persons interested,) and re-grant letters to such persons as may be entitled. How. & H. sec. 106, p. 416—See sec. 10.

§ 7. At common law, the Ordinary could revoke administration at pleasure, and there is nothing in the act of 1789, (S. Carolina) to divest him of that power in relation to strangers, although the temporal courts may control him in the exercise of it. 2 Hill's So. Car. R. 347.

The record of a county court, setting aside an executor and appointing an administrator, should show the reasons for so doing. 7 J. J. Marsh. 621.

The removal of an executor is a judicial act subject to revision by the Supreme court.—3 B. Monroe, 1. But that court can do no more at the instance of the administrator than revoke the order of removal. *Ibid.*

The court has power to revoke letters of administration, during the same term at which they are granted, and grant other letters. 1 Dever. 352.

If administration be revoked and a will proved, the executor cannot maintain *trover* against the administrator, nor one claiming under him for goods of the testator, in which such administrator had regularly obtained an individual title while administrator. Whether the administrator properly applied the value of goods, cannot be tried in this form of action. 1 Bailey's So. Car. R. 221.

Where the administrator at the time of an application for his removal, possessed the same capacity as he did when appointed, the court refused to remove him for want of capacity, although his appointment might have been injudicious. 2 How. 905.

A motion to revoke letters of administration on the ground that the administrator is not next of kin, can only be made at the instance of the next of kin. 1 How. 322.

§ 8. All acts done in the due and legal course of administration, are valid and binding on all interested, although the letters of administration be afterwards revoked. 1 Bailey, 221; 4 Ham. 138.

§ 9. Sureties on an administration bond, who have petitioned the court of Probates for relief, after counter security has been given and a new bond executed, are absolutely discharged from all liability, and they may plead the new bond in bar of any action, subsequently brought on the original bond. 3 Sm. & M. 234.

A county court (court of Probate here,) has power to take a new bond for the benefit of former sureties under the act, though no petition be filed or verified on oath, and no summons issued against the executor or administrator—the latter being present and not requiring these forms to be observed. 3 Iredell, 342.

§ 10. In Tennessee, the county court can for good cause shown, compel the administrator to surrender, and appoint another. 3 Yerger, 375.

An executor cannot by a surrender of his authority as such, avoid the rendition of judgments or decrees against him, in cases before instituted, for assets un-administered on at the time of his surrender. 5 Stew. & Port. 181.

An executor after probate of the will, accepting the trust and giving bond for its faithful performance, cannot renounce the trust.---12 Mass. 358.---By statute of Mississippi, he may, if the court so direct, unless injurious to the interests of the estate.—See sec. 6, *ante*.

CHAPTER XXXV.

SPECIAL ADMINISTRATION.

Adm'r. ad colligendum.

§ 1. During any contest about a will, or during the infancy, or in the absence of an executor or executrix, or until a will, which may have once existed and is destroyed, shall be established, the court may appoint any person or persons, to *collect* and *preserve* the estate of any decedent until probate of his will, or *durante minore ætate*, or until administration of his estate be granted, taking bond and security for collecting the estate, making an inventory thereof, and safe keeping and delivering up the same when required, to the executor or administrator. How. & H. sec. 24, p. 392.

(For form of letters so granted, and the oath and bond required in such case, see *Ibid.*)

§ 2. Every collector so appointed shall have power to collect the goods, &c., and to secure the same at such reasonable and necessary expense, as shall be allowed by the court; and the court may order, immediately *after* appraisement, the sale of such as shall be perishable, or not to be preserved, and the administrator must account for the same;—and for the *whole* trouble incurred, the court may allow a commission on the amount of debts, and property actually collected, and afterwards delivered to an executor or administrator, as to the court shall seem just—not more than *five*, or on the whole inventory not more than *three* per cent. How. & H. sec. 26, p. 393.

He shall have power to sue for debts to decedent, and release the same on payment thereof; and suit shall not abate by the revocation of his letters, but shall be prosecuted to final judgment, by the executor or administrator to whom letters may be granted. *Ibid.* sec. 27, p. 393.

§ 3. On granting letters testamentary or of administration, his powers shall cease, and he shall deliver on demand, all the property and money of the deceased, (except as before excepted,) to

the persons obtaining letters, and if he evade, refuse, or neglect to deliver, to such demand, made at a reasonable time and place, the court may *attach* and impose a fine not exceeding 10 per cent. on the amount of property, or his bond may be sued on by the person or persons to whom letters testamentary or of administration may be granted. *Ibid.* sec. 29, p. 393.

§ 4. Letters of administration in chief, granted *pendente lite*, are void—and exceeding the power of the court, are not good even as letters *pendente lite*.—3 Iredell, 557. But, in a case where the defendant to an action had obtained letters testamentary, pending a controversy about the will, and taken possession of the estate and administered it till appointment of the administrator *pendente lite*, to whom he then delivered it—the will was annulled—*Held*, notwithstanding that the executors having received letters after a due probate of the will, might perform every act proper for an executor to perform, notwithstanding the *lis pendens* about the will, and was entitled to the expense incurred in litigation, and to commissioners while managing the estate. There is no ground for considering him executor *de son tort*.—3 Wash. C. C. R. 122—see also 8 Cranch. 9—(See next chap. sec. 1.)

§ 5. Until the probate of a will and letters testamentary are obtained, there seems to be an absolute necessity for the appointment of some person to take charge of the estate till then, because the executor till probate cannot obtain any judgment. 8 Cranch. 9.

An administrator *pendente lite*, or *ad colligendum*, has no power to sell any except perishable effects. 3 Iredell, 549.*

Such administrator is merely an officer of the court to sue for debts of the deceased and hold his effects, till *lis pendens*, i. e. the controversy terminates. He has no power to distribute the estate. 3 Humph. 652.

An administrator *pendente lite* is not responsible for interest, if they do not use the money in their hands—Otherwise, if they purchase property and enjoy it. 16 S. & R. 416.

*Our statute authorizes him to sell goods that are "perishable, or *not to be preserved*." These last words, it is presumed, are only intended as explanatory of the word "perishable," and are not intended to confer power on the administrator to sell any goods *not* perishable. They mean such as "cannot be preserved," and "or" must be construed "and."

CHAPTER XXXVI.

ADMINISTRATOR—*Cum testamento annexo.*

§ 1. By act of Mississippi, "If letters testamentary, of administration or guardianship, be granted by the Orphan's court, and the party contesting the same, shall appeal to the court of Chancery or Supreme court, according to the provisions, &c. the court shall appoint a person to act as administrator with the will annexed, (if there be no executor legally qualified, under the will of the testator, or administrator of the estate of an intestate,) who shall take charge of the estate till a final decision; and such administrator shall give the like security, take the oath and perform the duties which are required of an executor or administrator, &c.; and, on a final decree certified to the court below, he shall surrender all the estate, papers, &c. to the person in whose favor such decree is, after the latter shall have complied with the requisitions of this act, and obtained an order of the Orphan's court for that purpose—in which case, the powers and duties of the special administrator shall cease, &c.—How. & H. sec. 1, p. 385. So, if the executor renounce, or being required to give security, fail, &c.—(See *ante* sections 1, 2, 3, 4, 5, 6, chap. 35)—and see How. & H. sec. 18, p. 389.

§ 2. A widow being named executrix, may refuse as such, and yet may act as administratrix *cum test'o. ann'o.*—and in the latter capacity, conjointly with another. The acceptance of the appointment would not make her executrix in fact, but would rather be evidence of her renunciation; nor would the appointment of a co-administrator be irregular or void. 6 Dana, 169.

Under the foregoing statute, if an executor has qualified, in case of a will, or an administrator in case of intestacy, an administrator *cum test'o. ann'o.* cannot be appointed.

Where a testator appointed three executors, with power to distribute his property, and they all died indebted to the testator, it was *held*, that the Orphan's court might appoint the son of the

surviving executor administrator *with the will annexed*, of such estate—there being no claim made by the next of kin, nor by the State, nor by the creditors. 9 S. & R. 186.

§ 3. In Mississippi, “all such estate, real and personal, as is not devised or bequeathed in the last will and testament of any person, shall be distributed in the same manner as the estate of an intestate, and the executor or administrator, &c. with will annexed, (as the case may be,) shall administer the same accordingly. How. & H. sec. 29, p. 393.

An administrator cum test’o. annexo, may exercise all the powers conferred by will on the executor. 1 Dana, 306.

The duties of an executor, resulting from the *nature of his office*, where the authority is not *necessarily* connected with a *personal* trust, and confidence reposed in the executor by the testator, devolve on the administrator *cum test’o. annexo*. 4 Mass. 634—see 1 A. K. Marsh. 88.

Where lands are directed by a will to be sold by the executors, and they renounce, the administrator with the will annexed cannot sell. Coxe, 432.

But it seems, a power to sell created by the will, invests the administrator with the will annexed with power to transfer all title which the testator had, and a conveyance by him (or the executor) will divest the heirs of all title by descent. 9 Dana, 102.

But this rule does not apply to such administrator in another State, who cannot under such power, sell land in this State, without also qualifying here. *Ibid.* 306, 316, 327.

An administrator with the will annexed having authority to sell land for payment of debts, may move to quash a sale of it, made under an execution vs. the heirs, unless the Chancellor orders the sale. 3 Dana, 188.

Where goods were seized in the hands of an administrator *pendente lite*, and sold under execution against the administrator for his personal debt, the administrator cum testamento anno. may have trespass or trover against the sheriff, for such seizure and sale—3 Iredell, 549—and the sheriff could not deduct from the damages the surplus of proceeds paid to the administrator *pendente lite*. *Ibid.*

An administrator cum test'o. ann'o. who sues *as such* during the absence of the executor, must aver such *absence at the time of bringing suit*. An omission is fatal. 3 S. & R. 44.

§ 4. If an administrator with will annexed, be removed to give place to executors, (as prescribed in How. & H. sec. 18, p. 390) he shall without delay exhibit his or her accounts, and deliver, on demand, all goods, chattels, and personal estate—and on failure, his bond shall be put in suit, &c. How. & H. sec. 19, p. 390.

CHAPTER XXXVII.

ADMINISTRATOR—*de bonis non*.

§ 1. By act of Mississippi, "In case any executor shall die before the estate be fully administered, letters of administration *de bonis non* shall be granted to the person entitled, agreeably to the rules hereinbefore laid down; and the proceedings shall be the same in all respects as if administration had been originally granted. How. & H. sec. 40, p. 397, and sections 45, 46, 47, pages 398, 399.

In Massachusetts, the next of kin has no right to claim letters of administration *de bonis non*, but the court may grant it to a suitable person.—3 Metcalf, 187. (In Mississippi, the statute makes it otherwise.)

Where an executor has been removed from office, and an administrator *de bonis non* been substituted, another person, having equal claim, cannot at a subsequent term obtain administration—the power of the court over the subject having ceased.—2 Virg. C. 230.

§ 2. If all the original executors or administrators are not dead, (or removed,) a grant of administration *de bonis non* is void.---6 Yerg. 167.—And a compromise made by an administrator so appointed is void.---*Ibid.* A grant of administration is an entire thing, and if one administrator dies, it survives to the rest.---6 Yerg. 167.

Administration *de bonis non* is to be granted where the estate is not fully settled, and the administrator has become a bankrupt and absconded---1 Root, 425---Or where there are debts unsatisfied, notwithstanding the estate is all distributed.---1 Root, 174. (But under the statute of Massachusetts, of 1817, authorizing the grant of administration *de bonis non*, “where there are debts due from the person unpaid,” it was *held*, that a legacy was not a debt due from the deceased within the meaning of the statute.—2 Pick. 361.

Under statute of 1784, sec. 10, it was *held* that where a testator had authorized his executor to sell lands for the support of his widow, under certain circumstances, and a stranger had supplied the widow, the contingency having happened after the executor's death, the claim on the estate in favor of such stranger did not constitute a debt within the meaning of the statute, so as to authorise an administration *de bonis non*. 2 Mass. 168.

Where a will nominating an executor, says—“I likewise appoint him my executor to settle my business, to pay off all my debts and accounts, which he may think just, though they may not be proved according to law:”—*Held*, the executor has plenary power, and the appointment of an administrator *de bonis non* is void. 3 Dana, 131.

§ 3. Where a court of competent jurisdiction has granted administration of an intestate's estate, the same court has, alone, jurisdiction to grant administration *de bonis non*. 2 Leigh, 761.

§ 4. An administrator *de bonis non* can maintain an action for those articles only which remain un-administered.---1 Howard, 68, 87, 146, 154---His liability is limited to them---8 Connt. 584. His powers are limited to subjects not administered.---*Ibid.* and Stubblefield *vs.* M'Craven, 5 Sm. & M. 130. He cannot therefore sue for a *devastavit* committed by his predecessor. *Ib.*—and see 4 Dana, 628.

Where the heirs had sold the land on which their ancestor held a mortgage, for a consideration to be paid to *them*, and 20 years had elapsed—the presumption is, that the personal representatives assented thereto, and the money will not be decreed to the administrator *de bonis non*. 4 Dana, 628.

Where an administrator takes a note payable to himself, *as such*, for debt to the estate, and dies, and administration *de bonis non* is granted, the legal title to the note is in the representative of the deceased administrator, but the equitable title is in the administrator *de bonis non*—and if on a final settlement of accounts the amount of the note appears to be due to the estate of the first administrator, the administrator *de bonis non* will be entitled to possession of the note. 2 Hill's Ch. R. 29.

An administrator *de bonis non*, who is also executor of his deceased administrator, who fails for a long period to call the agents of the former administrator to account, is chargeable with the whole of the balance appearing to be due from those agents, unless he can relieve himself from the charge of gross negligence. 2 Brock. C. C. R. 159.

An administrator *de bonis non* cannot recover from the administrators of A.'s executors, in *assumpsit* for money had and received by such executor to their use, and mixing such demand with others is error. 1 S. & R. 549.

Whether administrator of A. is entitled to recover in any form of action against the administrator of the executor of A. the balance due to the estate of such executor—query.—*Ibid*.

Where A. and B. were administrators of C., and B. died, and administration of his estate was taken out and bond given—A. settled his accounts, and was charged with the whole personal estate, but by report of the auditors, B. appeared accountable for part—*held*: If A. bring suit on such administration bond and die, the name of C.'s administrator *de bonis non* should not be inserted as plaintiff—but it should be A.'s administrator. 2 S. & R. 548.

A bill by administrator *de bonis non* against former administrator to account, his letters having been revoked—defendant's wife was one of two distributees—he had paid the debts and obtained the assignment of the other two distributees—*Held*: the assignment could not be impleaded by the plaintiffs. If fraud-

ulent only, the distributee or his representative could impeach it—if in fraud of creditors, they only could complain;—and for the same reason, the will of the distributee disposing of his interest in the estate was rejected. 2 Hill's Ch. R. 500.

The rule is the same, though judgments remain of record unsatisfied, especially, when from lapse of time they may be presumed to be satisfied, and where the judgment creditors are not parties claiming payment, the creditors should come in and swear that their judgments are unsatisfied; and it should appear that the defendant had notice of their demands within the year. After that, without notice, he would not be liable as administrator, and creditors would have their remedy against distributees. 2 Hill's Ch. R. 501.

In an action by an administrator *de bonis non* against the surety of the former administrator to recover a balance due on the administration account, testimony offered, on the trial, by the defendants, is competent and admissible, which tends to show that the amount sued for was a debt due, from the witness and another to the estate, and that in payment of it, the administrator who was insolvent, took, in liquidation of so much from the witness, a debt due by said former administrator to the witness, and if the proof shows, that the act took place by collusion between the parties in fraud of the estate, there would not be an extinguishment of the debt due from the witness and another to the estate, for that part of it which was pretended to be extinguished by the receipt, by the administrator of the claim against himself, and the witness would be still liable, and the administrator *de bonis non* would have to resort to him, and could not claim to recover of the sureties of the first administrator. 1 How. 146.

Where it appears from the inventory of an administrator that he has returned and given an account of a specific sum of money "on hand," "the goods, and chattels, and credits of his intestate," which he has failed to pay over, the administration bond may be put in suit for the benefit of a legatee, distributee, or creditor, but not for the benefit of the administrator *de bonis non*, the act of accounting for the money in the inventory being an act of administration, and the failure to pay over, mal-administration.—1 How. 87. An administrator *de bonis non* can have no interest

in a recovery for mal-administration, because the law only contemplates on his part a due administration of the assets *not* already administered. *Ibid.*

§ 5. An administrator *de bonis non* is not liable to an action on the implied warranty of the soundness of a slave, the property of his intestate, sold by his predecessor, under an order of court. 2 Bailey's So. Car. R. 317.

So, a judgment against the administrator *de bonis non* is no ground for a suit against the former administrator, for a *devastavit*—5 B. Monroe, 490—and *vice versa*—8 Connt. 584. The reason is, there is no privity between the former administrator and the administrator *de bonis non*. *Ibid.**

If on final settlement of the administrator he be allowed any commissions, he may retain any money of the estate in his hands, not exceeding such commissions in amount. (*Stubblefield vs. M'Craven*,) 5 Sm. & M. 130—See title "Inventory," sec. 15, *post*.

CHAPTER XXXVIII.

ADMINISTRATOR IN CHIEF—WHO QUALIFIED?

§ 1. No letters of administration shall be granted to any person under the age of twenty-one years; or of unsound mind; incapable according to law, of making a contract; or convict of any crime, rendering him infamous according to law;—and any question respecting age or infamy, or soundness of mind as aforesaid—may be heard and determined as if the same respected a person named as executor. How. & H. sec. 41, p. 397.

*A former administrator not shown to have committed a *devastavit*, is a good witness for the administrator *de bonis non*. 5 B. Monroe, 489.

§ 2. No question respecting age or infamy shall be determined by the Orphan's court, without summoning the person named in the will as an executor, or entitled to administration, and alleged to be under age or infamous, provided he or she be in the State, or without giving such notice by advertisement or otherwise as the court shall direct, in case he or she be out of the State, and hearing, in case the party shall attend agreeably to such summons and notice. How. & H. sec. 42, p. 397.

§ 3. All the provisions of this act relative to an executor or administrator, shall apply and extend to an executrix and administratrix, or executors and administrators respectively, unless otherwise expressly provided for;—and whenever a party in the *singular* number, or a *male* party is mentioned, the rule shall apply to a female, or to two or more having a joint interest or jointly concerned, applying or called upon, so far as the rule can properly apply, or so far as is not otherwise directed.---How. & H. ch. 36, p. 397. This section of the act extends to all the statutes affecting executors and administrators.

CHAPTER XXXIX.

ADMINISTRATOR---IN CHIEF.

§ 1. An executor or administrator is the only organ, through whom the rights of the next of kin can be ascertained, and there *must* be an administration---1 M'Cord's Ch. R. 324---And generally the executor or administrator is the only organ through whom creditors can get at the funds of an estate, or to whom a debtor is answerable.---*Ibid.* No person, though next of kin, can sue at law or in equity for the personal property of an intestate, unless he take out administration.---2 M'Cord's Ch. R. 514. None

but an executor or administrator can call on a third person, for any thing due to the deceased.—*Ibid.* (See *ante* pages.)*

CHAPTER XL.

ADMINISTRATOR'S INVENTORY.

§ 1. In every case where letters testamentary or of administration or collection, are granted, in order that all persons interested in the personal estate, may have an opportunity of knowing, as nearly as may be, the amount of the same, an *inventory* (in case the estate lies in one county, or can be conveniently collected together,) or *inventories*, (in case the property lies in more than one county, or cannot be conveniently collected together,) shall be returned to the office granting the administration. How. & H. sec. 52, p. 400—See sec. 12, *post*.

§ 2. On granting any letters testamentary a warrant or warrants shall issue, under the seal of office, authorizing three or more persons of discretion, *not related* to the deceased, *nor interested* in the administration, to appraise the goods and chattels and personal estate of the decedent, known to them or to be shown by the executor, administrator, or collector. How. & H. sec. 53, p. 400. For form of warrant, see *Ibid.*

On the death, refusal to act, or neglect of any appraiser, another warrant may issue forthwith, in its stead.—*Ibid.* (See sec. 13, *post*.)

§ 3. Before proceeding to act, the appraisers shall take the following oath, or affirmation, (as the case may be,) annexed to or endorsed on the warrant, before any person authorized to administer an oath.—*Ibid.* (See form of oath—*Ibid.*)

*The husband of an executrix may exercise all the powers of an executor, in consequence of the appointment of his wife, without any qualification on his part. 1 How. 322. But the right does not survive the wife. *Ibid.*

The appraisers shall proceed as conveniently as may be, to the discharge of their duty, and shall set down each article with the value thereof in dollars and cents—all the valuations on one side of the paper shall be set down in one column distinctly in figures opposite to their respective articles—the contents of each column shall be cast up and set down under the last column. How. & H. sec. 53. p. 400.

§ 4. When the inventory is finished, the appraisers shall certify the same, under their hands and seals, and a certificate of their having taken the oath aforesaid shall be thereto annexed, and every inventory shall be returned to the proper office within six calendar months from the date of the letters testamentary, of administration or collection—or within such time as the case may require, and the court shall appoint. Further time, on application of either party, may be granted by the court. And it shall be the duty of every executor, administrator and collector, to return the inventory or inventories which shall be delivered to him by the appraisers, and on failure thereof, an attachment may issue to enforce the return. On return of such attachment “executed,” the court may fine the party not exceeding fifty dollars. How. & H. sec. 55, p. 401.—See sec. 13, *post*.

§ 5. If there be any person interested in the estate within *three* miles of the place where the personal property is to be appraised, it shall be the *duty* of the executor, administrator or collector, and of the appraisers, to give notice to said persons, or at least *two* of them, of the time and place appointed for making the appraisement. How. & H. sec. 55, p. 401.

§ 6. Every executor, administrator or collector, shall return, within the time and under the pain aforesaid, with an affidavit of the truth annexed, an inventory of the money belonging to the deceased, which has come to his hands, and of the debts due to the deceased, which have come to his knowledge, specifying the nature of each debt, and setting down such as he or she shall deem *sperate*, distinct and separate from those which he or she shall deem desperate and doubtful. How. & H. sect. 57, page 401.

§ 7. Inventories and appraisements, or authenticated copies thereof, may be given in evidence in any suit by or against the executor, administrator or collector, but shall not be conclusive for or against him, if *other* testimony be given, that the estate was really worth or was *bona fide* sold for *more* or less than the appraisal. And each appraiser shall be entitled to \$2 per day, for his attendance, to be paid by the executor, administrator or collector, and charged to the estate. How. & H. sec. 56, p. 401. See sec. 14, *post*.

§ 8. Whenever personal property of any kind, or assets, not mentioned in an inventory already made out, shall come to the possession or knowledge of an executor, administrator or collector, an account or inventory of the same shall be returned appraised by three respectable, disinterested, sworn appraisers, appointed as aforesaid within *two* calendar months from the time of the discovery.—How. & H. sec. 58, p. 401—See note to sec. 14, *post*.

§ 9. In case an inventory be returned by a collector duly appointed, the executor or administrator thereafter administering, shall within three calendar months after the date of his or her letters testamentary, or of administration, either return a new inventory in place of the collector's inventory, or an acknowledgment in writing, that he or she hath received from the collector, the articles contained in the first inventory, or consent to be answerable for the same, in the same manner as if the said inventory had been made out after his or her administering on the estate—*Provided*, that nothing herein contained, shall be construed to render any executor or administrator answerable for not making a return of the inventory aforesaid, where it shall appear to the court, that he or she hath been prevented from making such return, by the improper detention of the goods of the deceased, by the collector aforesaid. How. & H. sec. 59, p. 401, 402.

§ 10. If there be more than one executor, administrator or collector, named in the letter, any one or more of them, on the neglect of the rest, may return an inventory; and the executor, administrator or collector so neglecting, shall not thereafter interfere with the administration, or have any power over the personal estate of the deceased;—but the executor, collector or administrator, so returning, shall thereafter have the whole admin-

istration, unless within two months after the return, the delinquent or delinquents shall assign to the court some reasonable excuse, which it shall deem satisfactory. *Ibid.* sec. 65, p. 403.

§ 11. If an executor, administrator or collector, shall not within *six* months after the date of his letters, exhibit to the Orphan's court an inventory of the estate of the testator or intestate, or at such other time as the court shall appoint, a summons returnable within not less than eight, or more than thirty days, may, *ex officio*, or on application of a person interested, be issued against such executor, administrator or collector, to show cause wherefore such inventory hath not been exhibited, and if the summons be duly returned "summoned," or upon two citations returned "non est," by the sheriff of the county, wherein the party resided at the time of obtaining letters, and he do not appear at the return of such summons, or appearing shall not show sufficient cause, the said court may immediately enter on its proceedings and record, that the said letters be revoked, and may grant other letters, &c. *Ibid.* sec. 64, p. 403.

§ 12. If no goods come to hand, no inventory is required.—1 Pick. 20; 5 Cranch. 19.

The estate not having come to the knowledge of the executor, administrator, or collector, does not render him liable.—1 Dana, 271.

Administrators are bound to inventory and account for provisions belonging to the deceased at the time of his death.—5 New Hamp. 492—See "Assets," and "Devastavit," *post*.

§ 13. The Probate court may compel an administrator to exhibit an inventory. 7 How. 311.

A judge of probate ought not to reject an inventory exhibited by an executor or administrator, because it contains property the title to which is disputed—for the rights of claimants of the property cannot be concluded by his decision. Kirby, 100.

It is the duty of an administrator to inventory property fraudulently conveyed by the intestate, and he is entitled to the custody of such property, especially if the estate is insolvent, and it is needed for the payment of debts, and he may recover it out of the hands of the fraudulent grantee.—11 Connt. 283.

Money in the hands of the intestate's wife, at the time of his decease, though earned and received by her before marriage, or given to her by her husband, must be inventoried as his property. 10 Pick. 429—(But see act of 1846.)

§ 14. Not returning an inventory on the estate of his intestate, is not sufficient to charge the administrator with a debt of the intestate.---2 Har. & J. 373.*

Under our law, (Mississippi,) it seems nothing will create a presumption of assets.---2 How. 617. But a failure to return an inventory, or receipt of the profits of the estate, and conversion of them to his own use, make an administrator liable on his bond.—2 How. 813.

A failure by an administrator to make an inventory of debts *due by him* to his intestate, may be a breach of duty for which he can be made liable on his administration bond. Yet it does not result that the debts due by the administrator are extinguished, and the amount in his hands so much money with which he is chargeable. 1 How. 68.

“One of two things is required to be done before the debt can be considered as so much money in the hands of the executor:—

Either---1st. He shall give in the claim against himself, in the list of debts due to the deceased—

Or---2d. In case he fail to do that, it must be found against him in the Orphan's court, by referees, or by an issue in the Circuit court.

“I do not think the debtor should be placed in a worse situation by becoming administrator of his creditor. The statute does not make him accountable, until the justice of the claim shall have been established, either *by his own confession entered in the inventory*, or by a legal determination against him by a jury.—See 1 How. 81, 82, citing 11 Mass. 256; 12 ib. 199; Toller, 348. (See title “Assets,” sec. 13, p. 273.)

*A copy of a paper purporting to be an additional inventory of the estate of the deceased, certified under the hand and seal of the Register of wills, to be a true copy taken from the original additional inventory *offered* by the administrator and lodged in the office of the Register, was *held*, not to be competent evidence to charge the administrator with the amount of the goods and chattels therein mentioned—2 Har. & J. 214—otherwise as to an *original* paper. *Ibid.*

A claim for rent due to the testator not having been mentioned in the inventory, or the executors having settled their account in the Orphan's court, and on the credit side prayed allowance for it, as not being collected, cannot conclude them as against the debtor. They may still recover, and in case of recovery they are liable, notwithstanding said account, to those beneficially interested. Sax. Ch. R. 404.

§ 15. An administrator *de bonis non* must return, in the time prescribed, an inventory of all the estate real or personal, that comes to his hands, whether included in the former inventory or not—otherwise, it is a *breach* of his bond.—2 Chip. 16. So if he do not settle his account within the time, a settlement after judgment on the bond by *nil dicit*, is no bar to an action by a party interested for his share of the penal sum. *Ibid*.

In an action on a probate bond, alleging as a breach the neglect of the administrator to make and exhibit an inventory of certain property belonging to the intestate, within the time specified in the condition of the bond—*Held*, that,

1st. An action accrued for neglect, though the time limited for rendering the administration account had not expired.

2d. The damages should not exceed the value of the goods omitted from the inventory, nor the amount of the debt sued for. 3 Connt. R. 389—See also 2 How. 905.

§ 16. In an action on a bond for not filing an inventory, the relator must show a *loss* resulting therefrom. 1 Cowen, 189.

Damages may be assessed for a failure to make and return an inventory. 1 Miss. 686.

CHAPTER XLI.

ASSETS.

§ 1. The appointment of an executor vests the whole personal estate of the testator in him. He holds as trustee for the purpose of the will, but he holds the legal title in all the chattels of the testator.---8 Cranch. 9; 4 Connt. 347; 10 Pick. 463; 9 Mass. 337, 352. This interest is incompatible with any power in the Ordinary to transfer those chattels to any other person by the grant of administration.---8 Cranch. 9.—See page 222, sec. 9.

This power extends to *all* the estate, as well for payment of debts as for distribution, and the court will not enquire for which purpose he seeks to recover.---Sax. Ch. R. [N. Jersey,] 437. He has all the power over it, existing at common law.---3 Mass. 514, 518.

And although after the death of a decedent the property may be considered in abeyance, till administration is granted, and then vests by relation to the time of the intestate's death---12 Mass. 309; 23 Pick. 128---yet an heir has, *interim*, only such an interest as is necessary to the safe keeping of the property. *Ibid.*

But the interest of the executor or administrator extends only to property within the State.---7 John. Ch. R. 45; 1 ib. 153; 6 ib. 353; 3 Mass. 514.*

§ 2. The lands of an intestate or testator, go to the heir, and are not assets in the hands of an executor or administrator, unless the personalty prove insufficient to pay debts, &c.—2 Peters, 492; 4 Henn. & Munf. 57; 3 Mass. 258; 4 ib. 356; 1 ib. 204; 11 ib. 190.

*But if an administrator receives foreign assets, and does not inventory and account for them, or procure any settlement of them in the Probate court, and a distribution of them according to law—though he be guardian, he will be deemed to have received them as administrator, and not as guardian. Some act or admission showing a retainer as guardian is necessary to exonerate him as administrator—5 Mason's C. C. R. 95—And the sureties are, in such case, liable in the same manner, as their principal.—*Ibid.* *A fortiori*, all would be liable, if the administrator never admitted receipt of such assets, but fraudulently concealed the fact from the parties interested. *Ibid.*

Therefore, an administrator is not bound to inventory real estate. 1 Mass. 35; ib. 204; 11 ib. 190.

Real estate, devised to be sold for the payment of debts, is *equitable* assets, constituting a trust fund in the hands of the executor, or administrator *cum testamento annexo*—subject to the control of the Chancellor, and distributable among the creditors *pro rata*, without regard to the dignity of their claims. 4 Dana, 603.

An executor is not chargeable with the proceeds of such sale, on plea of *plene administravit*. Such plea will be sustained by proof that the *legal* assets have been administered. *Ib.* 604.

Nor, are rents and profits of land, accruing after the death of the testator or intestate, assets, though the estate be insolvent—16 Mass. 280; 14 ib. 88; 15 ib. 26; 14 Pick. 345—except in cases hereafter mentioned.*

Nor are buildings assets, when placed by the deceased on his wife's land—16 Mass. 449—And a note to husband and wife goes to the wife, if she survives, and not to the husband's administrator. 16 Mass. 480.

§ 3. But a *still not fixed* to the freehold in a house which might be injured by its removal, is personal property, and goes to the executor and not to the heir. 2 Henn. & Munf. 22.

And, a mortgage on land, if the *debt* secured be assets, must be inventoried.—16 Mass. 18; 19 Pick. 391, 491; 11 ib. 173; 14 ib. 399; 9 Mass. 395; 16 Mass. 449—But the administrator of the mortgagor is not entitled to the surplus proceeds of a sale of the mortgaged land. It is considered a part of the realty, and goes to the heir. 1 John. Ch. R. 119.

And an order peremptorily to sell, not conditional, so that none of it can go to the devisee or heir, makes land, in equity, at the moment of his death, personal property, and an unconditional gift of the proceeds will be a legacy, for which the sureties on the executor's bond will be liable. 7 Dana, 12.

*And rents of land leased by an executor acting under a will, which is afterwards set aside, cannot be recorded either by the subsequent administrator or the heir. 2 Bailey's R. 311.

But, if land is devised to a testator's wife and children, and a *discretionary* power to sell is given to the executor, the proceeds would pass as a *devise* and not as a legacy, and sureties on the executor's bond would not be liable.---*Ib.* 12. The executor would hold as trustee, to be reached in equity.---*Ibid.*

Pending a suit brought to rescind a sale of land, a receiver is appointed—rescission is decreed, and vendor dies—the rents and profits in the hands of the receiver are *assets*. 9 Pet. 275.

§ 4. Grain and annual fruits of annual labor, are assets.---1 Harr. 81; 7 Mass. 34.

The common law gives to the executors of a tenant for life such *emblemments* *only* as were seeded in his life time. As to crops put in after his death, the executors (where the common law rule applies,) should be charged a reasonable rent for the land, to go to the reversioners or remainder-men. 6 Munf. 514.*

A mortgagee of real estate is not entitled to the *emblemments*, severed by another person. 9 Connt. R. 216.

§ 5. By act of Mississippi, "If any executor, administrator or collector, shall be of opinion that it would be of advantage to the estate of the testator or intestate, to dispose of the crop growing at the time of his or her decease, it shall be lawful for the Orphan's court of the proper county, on the application of such executor, administrator or collector, to order the sale of said crop either at public or private sale, on a credit of six months, taking of the purchaser or purchasers good and sufficient security for the payment of the purchase money. But if the court shall on hearing, be of the opinion that such sale would not be of advantage to the estate of the testator or intestate, then the executor, administrator or collector, shall proceed to finish the crop on hand; and in that case, no division of the slaves employed in such crop shall take place, till the first day of January next after the death of the testator or intestate. And the proceeds of the crop shall be assets

*In Virginia, the provisions contained in the 54th section of the act concerning wills, &c. "that the *emblemments* severed between 1st March and 31st December in any year, shall be assets in the hands of the executors," does not apply to the case of an estate for life, held under a marriage contract, dated in 1776—though the tenant for life died in 1801—and the law enacted in 1785, took effect 1st January, 1787.—6 Munf. 514.

in the hands of the executor, administrator or collector, subject to debts, legacies and distribution—the taxes, tools, the expenses of feeding the slaves to that time and delivering them well clothed, being first deducted; and in either case the executor, administrator or collector, shall render an account to the Orphan's court of his proceedings, in relation to said crop.---How. & H. sec. 63, p. 403---(amended by section 107, p. 416, as follows:—"The ninety-third section of an act to which this is an amendment, shall not be so construed as to prevent executors, administrators, or guardians, from selling for cash, or consigning for sale, the crop or crops of cotton or corn they may have charge of, provided, they obtain an order from the Probate court of the proper county." See sects. 6 & 7.

§ 6. All debts contracted by an administrator who is lawfully carrying on a farm, and completing a crop growing at the time of the death of the testator or intestate, so far as such crops are for necessities, are privileged claims on the income of the place, although not on the property; and a subsequent administrator is bound to pay such debts. But if the proceeds of the crop have been appropriated to the payment of debts due from the deceased in his life-time, or have been declared assets, then such creditor is entitled to payment out of any other fund of the estate.--7 How. 150. This case, decides that supplies of medicine and oils, may be paid out of the crop, and their price, of course, deducted from the amount reported as *assets*. *Ibid*.

In this case, the court say, "the object, reason and spirit of this statute, evidently include some things which are not mentioned. Whatever is essentially necessary to the making and gathering of the crop, must be included and nothing more. This claim seems to have been created for medicines, and as such, may be regarded as necessities; for an administrator would be bound to take care of the health of the negroes, by procuring medicines and medical aid, if necessary, although the statute does not expressly authorize these things. Such expenditures are to be paid out of the proceeds of the crop, the surplus only being assets." *Ibid*.

And "an executor derives his authority from the will, and is authorized to take charge of the estate of the testator before he

qualifies, and expenses which he incurs in taking care of the estate, are a charge on it.—*Ib.* But see ante p. 225, sec. 12.

§ 7. Generally the executor should sell the estate in the market usually resorted to;—but if he acts otherwise in good faith, as where he shipped cotton to Liverpool, instead of selling it in Charleston—and the Liverpool price was less than he was offered in Charleston, he will not be chargeable with the difference. 2 Hill, 364. But if the executor had previously obtained an order of the Probate court, it would be otherwise in Mississippi—and strictly, the executor is not liable for crops at all, except the crop growing at the time of the testator's death, which alone is declared by the statute to be assets. Without such statute, even the growing crop, not severed, would have belonged to the heir or devisee, to whom the land would have passed—16 Mass. 280; 14 Pick. 345—except in case of tenant for life, whose executor would take the crop as emblements. (See ante sec. 4, p. 267.) Yet the practice has long been, and still is, for executors and administrators to hold the land and negroes together for several years, making crops, and selling them without orders of court, at whatever market they please. This is a fruitful source of fraud, which needs legislative reform.*

§ 8. Where damages were assessed by the county court in favor of the owner of the land, through which a highway had been laid out in his life-time, payable at a future period, which did not arrive till after his death, they were *held* to be *assets*, when assessed, and as such to vest in the executor. 4 Connt. 182.

So, of money received of the United States government under a treaty, as indemnity for loss suffered in the life-time of the ancestor. 20 Pick. 67.

So, of damages for breach of covenant of seizin if broken in the life-time of the covenantee—4 John. 72—and so, for breach of covenant to convey—2 Dana, 465. They go to the executor as assets, and not to the heir. *Ibid.*

So, land-scrip issued to the heir under the act of 1828, is liable, in *equity*, to the debts of the ancestor. 10 Yerg. 117.

*In Kentucky, where a man dies after the first day of March, his servants and slaves are to be kept on the farm to the end of the current year, and the crop of that year, after paying certain expenses, will be assets. 5 Dana, 92.

The hire and increase of slaves in the possession of administrators are assets, as much as the slaves, and so the increase, the administrator being trustee. 2 B. Monroe, 446.

In Ohio, under act of 1816, equitable interests are assets, and could be sold as real estate to pay debts.---9 Ohio R. 145. By the same act the court of one county could order a sale of land in another county. *Ib.* 67.

Such also, it is presumed, would be the rule in Mississippi.

§ 9. Debts to a decedent are assets, but not to charge the administrator, till he has received the proceeds.---3 Sm. & M. 625. If he compromise or release a debt, and appear to have done so for the benefit of the estate, he will not be chargeable with it as assets.---*Ibid.* He is not responsible for loss of debts, unless occasioned by his fraud or wilful misconduct.---*Ibid.* All debts are presumed to be assets till shown to be desperate. 11 Wend. 361.

Where an administrator recovers in his own name, on a contract made with him personally, after the death of the intestate, respecting the estate, or for money received by the defendant for the use of the estate, after the death, he is answerable as administrator, for the amount received, as assets.---14 Mass. 327; 9 ib. 337; 7 Pick. 100; 20 ib. 67.

Whatever money is received by an executor or administrator, as such, whether rightly or otherwise, he must account for, unless he show a legal liability to pay it over to one lawfully claiming the same---10 Pick. 77---as where he receives money for land sold by his intestate, though the title prove defective, unless he show that he is under a legal obligation to refund.---*Ibid.* So money recorded on an appeal bond payable to administrators.---5 Gill & John. 102.

§ 10. By a reasonable construction of the statute, a remainder or reversion expectant on the determination of the estate for life, or term for years, though not within the strict letter of the statute, is assets for the payment of debts.---14 Mass. 88; 15 ib. 26.---Accordingly, a reversion after a widow's dower may be sold for payment of debts by order of court.---15 Mass. 26; 13 Peters, 464. But real estate, or any interest therein, is not assets till a deficiency of the personal estate.---3 Mass. 258; 4 ib. 353---and see sec. 2, *ante*.

Lands descended in another State cannot be assets in this State. 9 Mass. 395. Nor are monies arising from sale of such lands on an order of the court of Probates there; and cannot be so averred in a replication to a plea of *plene administravit*.—2 Wendell, 470.*

§ 11. A bond payable to an administrator in his fiducial capacity, is assets in the hands of the administrator *de bonis non*. 2 Stew. 133; 2 Hay. 277.

But see 7 J. J. Marsh. 188—where it is said, bonds executed to an administrator in his fiducial capacity, in consideration of assets sold by him, are *not* assets in the hands of an administrator *de bonis non*—not being things left *in specie*, by the intestate. 7 Dana, 450.

An assignment, taken by an administrator of a mortgage of his intestate, is presumed to enure to the estate, and one claiming under it as enuring to the administrator individually, must rebut this presumption, as by showing that the administrator purchased with his own funds, or he must show himself ignorant of any circumstances raising the presumption.—1 Verm. 167. An administrator being also mortgagee, is not liable to account as administrator for proceeds of the sale of the mortgaged property.—3 Mason, 284.

Arrears of interest due a widow for her thirds, belong to her executor or administrator, and not to her next of kin.—2 Wharton, 420.

Where an intestate was security for C.—C.'s obligation to indemnify him is not assets, till payment of the note indorsed by the intestate or his administrator.—11 Connt. 283. In the latter case it has, in judgment of law, been paid to the debtor's executor, and is considered as money in his hands. *Ibid*.

§ 12. It is a general rule that if a creditor appoint a debtor his executor, and the debtor accepts the trust, this extinguishes the debt, unless it appear from the whole will that the testator did not so intend. 2 Cowen, 781.

*Whether an heir at law, who is also administrator, is liable for the rents of real estate, in his possession, without some contract express or implied—*quere?* 5 Green. 387.

Such an appointment is considered as a specific bequest to the debtor of the debt, and as such takes preference of general legacies. 2 Cowen, 781.

But a qualification, as universal as the rule is, that when there is a sufficiency of assets to pay debts, the debt due from the executor is not discharged, but is considered as money in the hands of the executor.—2 Cowen, 781. The debt is not extinguished as against creditors or legatees. Coxe, 153: 19 John. 188.

But debts from executor or administrator are so far assets, as to give jurisdiction to the court of Probates of the county where the executor resides—Coxe, 153; 2 Connt. 533—and a discharge by an administrator there appointed is valid. *Ibid.*

In Mississippi, “the bare naming of an executor in a will, shall not operate to extinguish any just claim which the deceased had against him, but it shall be the duty of every such executor, accepting the trust, to give in the claim in the list of debts; and on his failure to give in such claim or any part thereof, any person interested in the administration may allege the same, by petition to the Orphan’s court granting the administration, and the said court, with consent of parties, may decide on the same; or, it may be referred by the parties, with the approbation of the court; or, at the instance of either party, the court may direct an issue or issues to be tried, and the same shall be tried in the Circuit or Superior court of the same county, and such court shall have power to direct the jury and grant a new trial, as if the issue or issues were on a suit therein instituted, and a certificate from such court or any judge thereof, of the verdict or finding of the jury, under the seal thereof, shall be admitted by the Orphan’s court, to establish or destroy the claim or any part thereof. And if the executor shall give in such claim, he shall account for the sum due in the same manner as if it were so much money in his hands, and on failure his bond may be put in suit.” How. & H. sec. 67, p. 404.

In like manner an administrator or collector shall give in a claim against himself, and on giving it, or failing to give it, there shall be the same proceedings in every respect as are herein prescribed, in regard to executors. How. & H. sec. 68, p. 404—& see title “Inventory,” *ante*, sec. 10, p. 261—& next sec. 13.

§ 13. Appointing bond debtors, principal and sureties as executors of the will, releases them from the debt, and the amount thereby become assets in the executor's hands.—6 Watts, 42.—And where the obligor in a bond becomes administrator of the obligee, the bond is forever suspended and the debt becomes assets in the hands of the debtor, as administrator. 4 Ham. 138.

In Mississippi, the law under our statute, is different.—See title "Inventory," sec. 14, p. 262, *ante*.

§ 14. An executor or administrator is not bound in all cases and under all circumstances to *litigate* his testator's or intestate's title to goods found in his possession, at the time of his death, but which are claimed by third persons. He is entitled to exercise his discretion on questions of property, and if he surrender the goods, he cannot be made liable for the value, except on proof of negligence or fraud. 1 Bailey's R. 528.

It is the duty of the executor or administrator, to whom the intestate has made a fraudulent conveyance, to inventory the estate so conveyed, as assets, without waiting to ascertain whether it will be wanted or not, for the payment of debts—3 Connt. 389—Although the intestate or testator had executed a receipt for the purchase money, none being paid.—17 Mass. 222. The executor or administrator is entitled to the custody of such property, fraudulently conveyed—especially if the estate is insolvent and needed for the payment of debts—and he may recover it from the fraudulent grantee. 11 Connt. 283—*See also 11 S. & R. 377.

Where property is conveyed without valuable consideration, by a debtor to his son, and possession accompanies the deed, tho' the deed be fraudulent as to the creditors of the donor, such property is *not*, after the donor's death, assets in the hands of the donee, even though the donee is the legal representative of the donor—and the donee is not responsible for the profits accruing before filing the bill by the creditors of the donor, impeaching the deed as fraudulent. 1 Brock. C. C. R. 500.

*An executor, administrator or collector, cannot avoid a gift made by his testator or intestate, as fraudulent—1 Bailey, 528. He has no rights except what his testator or intestate had—2 Hill's Ch. R. 613—And his being also creditor does not alter the rule—7 John. 161—But in the latter case, he may, as creditor, sue the grantee as executor *de son tort*. *Ibid*. But see 17 Mass. 222; 3 Connt. 389.

A loan of slaves, though not declared in writing duly recorded, and therefore void, as to creditors—the loanee having continued in possession five years without such demand as would bar their right, is nevertheless binding between the parties and their representatives. If therefore the loanee die in possession of such slaves, they are not to be considered as assets belonging to his estate, nor can they be received as such, being liable to creditors so far as assets in the hands of the executors are insufficient, and no farther.—5 Munf. 503. In case of such deficiency, a court of Equity will subject them to the relief of creditors. *Ibid.*

In an action by an administrator for the recovery of property from a fraudulent grantee, the defendant claimed, that the implied promise of a person for whom the intestate had been surety, such person being able to pay—was a claim which the administrator was bound to inventory, and should be taken into consideration in deciding whether or not, the property sought to be recovered was needed for the payment of debts—*Held*, on motion for a new trial, that such claim was not assets till the debt was paid, and as the insolvency of the estate was founded in part on the testator's liability as such surety, the jury had passed on the subject.—11 Connt. 283. So, where the defendant in such action, claimed that a certain sum which he had agreed, in consideration of the fraudulent conveyance, to pay to each of the five daughters of the intestate, should be considered by the jury as assets in the hands of the administrator—it was *held*, after verdict for the plaintiff, that the jury having found the whole contract fraudulent and void, the administrator could establish no claim founded on the consideration. *Ibid.*

An administrator must inventory and administer notes belonging to his intestate's estate, deposited in the hands of a stranger. 1 Fairf. 53.

§ 15. If the intestate, at his death, owned two pieces of land, which came to the hands of the administrator, but which he had neglected to inventory, and as is alleged, it was fraudulently conveyed by the testator or his intestate—a *scienter* on the part of the administrator must be proved to render him liable, for failure to inventory. 8 Connt. 106.

Where the creditors of an estate represented to be insolvent, requested the administrator to inventory certain estate, alleged to have been fraudulently conveyed by the deceased, and offered to indemnify him therefor—the refusal of the administrator was *held* to be a sufficient cause for his removal, without proof that the conveyance was fraudulent. 7 Pick. 250.

§ 16. Choses in action which belonged to the wife before marriage, if the husband has reduced them to possession, pass at his death to his administrator as *assets*, and not to her. But if he dies, before having reduced them to possession, they pass to her—and if she dies, before he has reduced them to possession, they pass to her representative and not to him.—5 Dana, 92. *A possession, as administrator in right of his wife, is not sufficient.—3 Stew. 375.

In Kentucky, slaves owned by the wife at marriage, or conveyed to her by bequest or otherwise during coverture, vest by statute in her husband and pass to his administrator—4 Dana, 610—unless it clearly appear, that it was intended to bequeath them as her independent and separate property; in which case the husband would be trustee, and equity would compel him or his administrator to execute the trust.—*Ibid.* 610, 611. If in such case the husband's administrator takes possession of the negroes, the widow cannot maintain an action at law for them—because the legal title is in the administrator, and the equitable title only in her—unless, the administrator assents to her right, which will confer on her the legal title also, and enable her to sue for them at law. 4 Dana, 610, 611.

Money, in the hands of a decedent's wife at his death, though earned and received by her before marriage, or given to her after marriage by her husband, is assets and must be inventoried. 10 Pick. 429.

*An assignment by the husband of the wife's choses in action, as collateral security, does not deprive her of the right of survivorship, if he die before they are reduced to possession. 1 Rawle, 279.

But see 6 John. 112—which decides, that a husband who survives his wife is entitled to her *choses* in action, whether reduced to possession or not—and in case of her death, go to her personal representatives.

In a case where the complainant claimed performance of an agreement to convey a house and lot for the benefit of the complainant's wife, in expectation of which the complainant had spent a large sum in improving the property—the court *held*, that there not being sufficient evidence of an agreement to convey, that the property should be sold, and the improvements paid for out of the proceeds. The property did not bring the amount expended, and it was *held*, that the balance unpaid was not a claim against the wife's father's estate, and could not be claimed of his representatives, his estate being insolvent. 13 Peters, 128.

Marriage is an absolute gift to the husband of all the wife's chattels in possession, and of her *choses* in action, if he reduce them to possession. 8 Mass. 99, 101; 13 ib. 384; 17 ib. 57.

The rents and profits of a wife's real estate which accrue during coverture, belong absolutely to the husband, and upon his death constitute assets in the hands of his representatives. 10 Pick. 463.

A note payable to a *feme coverte*, is payable to her husband, who alone during his life has power to enforce payment, and at his death it will go to his executor or administrator. 8 Mass. 229.

A husband has control of a legacy given generally to his wife, and may release or assign it by a deed to which she is not a party. 5 N. Hamp. 564. And he may sue, after the wife's death, for a legacy accruing to her, during coverture.—14 Pick. 352. But see 2 Dev. & Batt. 272.

A testator, by his will, gave to his daughter a legacy, to be paid to her, in one year after the death of her mother. The daughter, having married, died without issue, before the death of the mother, leaving brothers and sisters—*Held*, that the husband was entitled to administer upon and receive such legacy, when it became payable.—3 N. Hamp. 129; 4 Rawle, 66; 12 Pick. 173—So, of a wife's distributive share.—*Ibid*. 2 Connt. 564—But see 3 J. J. Marsh. 208.

So, where a testator, in a certain event, directed his lands to be sold, and the proceeds divided among his children, naming them, some of whom were married, it was *held*, that their husbands took the bequest. 3 Rawle, 199.

Where the lands of a feme covert are sold under the authority of a private act of Assembly, declaring that the purchase money shall pass and be held, as it would have been if the husband and wife had joined in the sale, the money belongs exclusively to the husband, and is subject to his debts. 1 Litt. 126.

Where the wife has a legal estate in personal property, and the right of immediate possession in severalty, the rights of the husband will vest the property in him. 1 Hill's S. C. 191.

Where a feme sole, who is entitled to slaves in remainder or reversion, marries and dies before the determination of the particular estate, the right vests in the husband. 1 Wash. 30.

If the husband obtain possession of his wife's personal property, without having taken out letters of administration, he may retain it against his wife's next of kin. 6 John. 112.

In Mississippi, the common law rule on this subject prevailed in its utmost rigor, till by the statute of 1839, it was enacted that "any married woman may become seized or possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name, and as of her own property—*provided*, the same does not come from her husband after coverture." How. & H. 332.

And, "hereafter when any woman, possessed of property in slaves, shall marry, her property in such slaves and their natural increase, shall continue in her, notwithstanding her coverture;—and she shall have, hold, and possess the same as her separate property, exempt from any liability for the debts or contracts of her husband." *Ibid.* 332.

And, "when any woman during coverture, shall become entitled to, or possessed of slaves, by conveyance, gift, inheritance, distribution, or otherwise, such slaves, together with their natural increase, shall enure and belong to the wife, in like manner as is above provided as to slaves which she may possess, at the time of marriage." *Ibid.* 332.

And, "the control and management of all such slaves, the direction of their labor, and the receipt of the productions thereof, shall remain to the husband agreeably to the laws heretofore in force. All suits to recover the property or possession of such slaves, shall be prosecuted or defended, as the case may be, in

the joint names of the husband and wife." And "in case of the death of the wife, such slaves descend and go to the children of her and her said husband jointly begotten;—and in case there shall be no children born to the wife, during such her coverture, then such slaves shall descend and go to the husband and his heirs. *Ibid.* 332.

§ 17. Under the foregoing statute, it has been decided, that "in a grant of property to a married woman, the words 'in her own right' would not, by the common law, convey a separate estate in the property to the wife, but would operate as a conveyance of the property to the husband. 2 Sm. & M. 165.

"A general principle that governs in the interpretation of conveyances of the kind first spoken of, is that there must be a clear and unequivocal intention evinced in the instrument by the grantor, that the wife shall possess the exclusive interest in the property conveyed. No set form of words is necessary to create such an estate, but it must be clearly manifest, either that the husband is excluded, or that the wife's control is independent of the husband's power. The best received technical phraseology is in the employment of the words, "sole and separate use." Among other terms used in cases decided to carry with them such an estate, and collected in Clancy's husband and wife, are "to be at her disposal"—"to enjoy and receive the issues and profits"—"given for the livelihood"—"the wife's receipt to be a discharge, notwithstanding her coverture"—"her receipt in writing to be a discharge"—"to be delivered up to her when she shall demand or require the same."—These expressions either pointedly exclude the husband, or so plainly limit to the wife the right, title, interest, enjoyment or control of the property conveyed, as to distinctly and positively preclude the common law authority, or investiture of property in the husband, so as to leave no doubt of the design of the grantor or donor. 2 Sm. & M. 185.

"The same work has enumerated a series of cases, where the language has been interpreted to convey property to the separate use of a feme covert. For example—"her own use and benefit"—or, "to her use." In one case, there was a bequest to a married woman, "for her sole and separate use;" and subsequently in the same will, a further amount "for her own use and benefit," which

latter was held not to invest a separate estate in the wife."—*Ibid.*

The words "in her own right," would have been no stronger, at common law, in effect, than the phrase "to her own use and benefit," and would have operated as a conveyance of the specific property in the deed to her husband, had it not been for the intervention of the statute."

"From the whole tenor of the statute, it is plainly deducible that it was designed to guard the *specific property* from any liability for the debts and contracts of the husband. It reaches no further. The products of such property follow the common law rule and belong to the husband, and are liable to his debts and contracts." *Ibid.* 186; *ib.* 567.

And, where a married woman stood by, and suffered without objection certain slaves owned by her, as her separate property, to be valued for her husband, and in his presence, with a view to his taking stock in the Northern Bank (of Mississippi,) upon a mortgage of the slaves—*Held*, that her conduct was not such as would divest her of her property. 1 Sm. & M. 48.

In this case, M. in the year 1808, in Virginia, settled certain slaves upon her daughter, during her life, and after her death, upon her children, by deed, which was recorded in the proper county of Virginia, in about eighteen months after its execution. The parties resided in the same place till 1835, when they moved to Tennessee, and in 1836 they moved to this State. In the year 1838, the husband of the donee died; the deed of settlement has never been recorded in this State—*Held*: the property conveyed by the deed of settlement was not liable to the husband's debts. *Ibid.*

A private sale by an administrator who has intermarried with the widow of his intestate, of property belonging to the estate, passes only the right the husband acquired by marriage, and does not affect the right of the distributees. 1 Sm. & M. 208.

By the common law, the husband is entitled, during coverture, to the *usufruct* of the wife's estate, and a lease of her land by him, is good during coverture. Nor is the common law rule altered by the statute of February 15th, 1839, entitled "An act for the protection and preservation of the rights of married women."—4 Sm. & M. 193.

F. a judgment creditor of J. B. garnisheed B., who answered that he owed J. B. or his wife, for the lease of a house, which house, it appeared in the proof, was the sole property of the wife of J. B.—*Held*, that the creditor of J. B. was entitled to the amount due by B. for the rent. *Ibid.* 193.

By act of 1846, ch. 13, p. 152, the 4th & 5th sects. of the act of 1839 are repealed—and it is enacted, that “the rents, issues and profits of real estate owned by any married woman in her own right, at the time of her marriage, while sole, or subsequently acquired by her under the provisions of the first section of the act to which this is an amendment, shall inure to the sole and separate use and benefit of such married woman.” And further—“when any married woman shall own and possess in her own right, a plantation and slaves, it shall be lawful for her to acquire, and to hold and possess, in her own right, exempt from liability for the debts and contracts of her husband, all such stock, farming utensils, and implements of husbandry, as shall be necessary for successfully conducting the business and operations of planting.” And further—“the products and proceeds of the labor of all slaves, owned by a married woman, in her sole and separate right, shall enure to her sole and separate use and benefit. And it shall be competent for her jointly with her husband to make any contract for the sale or hire of any such slaves, for their necessary clothing, maintenance, care and support, and for the employment of any agent or overseer for their management and control. And all contracts for the purchase of supplies for the plantation and slaves, or for the slaves alone, owned by any married woman, made by the husband or wife, or by either of them, either express or implied, shall be obligatory on the husband and wife, and may be enforced against the proceeds and income of the separate property of such married woman—*Provided*, that all sales of any such slaves, shall be evidenced by bill of sale under seal, acknowledged by such married woman, as deeds of married women are required by law to be acknowledged.” And further—“all suits for the recovery of the property or possession of such slaves, shall be prosecuted or defended in the joint names of the husband and wife. And all suits upon contracts, in relation thereto, or affecting the separate property of the wife, either

real or personal, shall be prosecuted or defended in the joint names of the husband and wife; and may be prosecuted in courts of common law jurisdiction, in all cases in which said courts shall have jurisdiction of the subject matter in controversy between unmarried persons."

And moreover—"it shall be competent for a married woman by deed of conveyance executed jointly with her husband, according to the laws of this State in relation to deeds made by *femes covertes*, to sell and convey her real estate as fully and effectually as she could if she were unmarried. If any married woman shall die seized and possessed of real estate or freehold acquired under the provisions of the act to which this is an amendment, her husband surviving shall be entitled to tenancy of the same, by *curtesy* in the same, as in other cases; and if she die possessed of slaves or other personal chattels, as her separate property, leaving issue of her body, either by a former husband or by her surviving husband, such slaves or other personal chattels shall descend to her child or children, in equal shares. But if she die without issue surviving her, the same slaves and other personal property, shall vest in the surviving husband."

Moreover—"a schedule of the real and personal estate of any married woman now owned separately from her husband, under the provisions of this act, shall be recorded in the clerk's office of the Probate court of the county in which such property is situated, within six months after the passage of this act, and a similar schedule shall from time to time, be recorded within three months after the acquisition of any property, real or personal, by any such married woman; and for making such record, the clerk of Probate shall receive the same fees as they are entitled to for recording deeds."

§ 18. Having shown what are assets, we will next enquire what are not assets.

It has already been seen that land does not constitute legal assets, except when the personalty is insufficient for payment of debts and legacies—Sec. 2, p. 265. How land may be converted into assets, will hereafter be shown. See ch. 42.

§ 19. A payment of money, allowed to the ancestor for prosecuting a person who has violated the law prohibiting the slave trade, by Congress, to his heirs, is not assets.—13 Peters, 409.—The prosecution was not done under authority of law, and imposed no obligation on the government to compensate them. The claim for such services could not be set up as a legal or equitable offset to a demand of the Government against him or them, if any, while under the rules of law, any specific demand on the Government founded on any *equitable* obligation, might be so offsetted.—*Ibid.*

Only services rendered under the law or a contract, constitute a legal demand on Government. Services, under a casual and in some degree discretionary authority, may constitute an equitable claim. No individual can be made a debtor against his will.—Voluntary benefits may be conferred on him, which may excite his gratitude, or which he may in his generosity reward. But this depends on his own volition. It would constitute a singular item under the law of assets to raise a charge against an individual for a benefit conferred, by some voluntary act of kindness.

The rule is the same, whether the benefit be conferred on the Government or on an individual.—*Ibid.* The claim against a foreign government is not of this nature, being founded on the law of nations, and a perfect obligation on the offending government.—*Ibid.* 409 & 486.

§ 20. Specific personal property held by the deceased in trust, and clearly distinguishable from the testator's own property, is not *assets* in the executor's hands, but must be held by him as his testator held it. Otherwise, where the property has no earmark, in which case the party entitled must come in as a general creditor. 11 Pick. 173; 1 Sumner's C. C. R. 131.

Stock, held by a trustee, is not assets, in the hands of his administrator or assignee. 1 Sumner, 133.

An executrix having a right to the possession of an estate for life, or during widowhood, purchased slaves with the mesne profits; and they were held to be her own property and not that of the estate, notwithstanding her declarations that they were purchased for the estate. Harper, 42.

§ 21. The property of a decedent, which by law is exempt from execution, passes to the widow and heirs, if any, and is not assets. 1 Dana, 271—and see How. & H.

§ 22. Upon the death of one partner, the surviving partner has a right to settle the affairs of the partnership; and the administrator of the deceased partner can only claim the residue after paying the deceased partner's debts;—and where he receives claims from the surviving partner for collection, which are offsetted by mutual claims, the administrator is liable only for the excess collected by him and retained by consent of the surviving partner. 5 Dana, 399; 4 Sm. & M.

§ 23. Where a testator authorized and directed his executors, and the survivors of them, to lay out a certain tract of land into lots, and to sell and dispose of the same, and he gave the proceeds to certain nephews and nieces, who were also residuary legatees, to be equally divided between them, and the executors sold the lots and received the proceeds—*Held*, that these proceeds were received by them as *trustees*, not as executors, and therefore ought not to be brought into the administration account.—5 Whart. 228—Sec. 20, 282.

§ 24. The money arising from the sale of personal property is called *legal* assets in the hands of the executor or administrator; those which arise from the sale of the real estate are called *equitable* assets. 5 Peters, 160.

Outstanding debts are *legal* assets—equitable assets are such as can be reached only through equity—and they alone are subject to the rule of equitable distribution. 4 Dana, 603; 12 John. 120—See sec. 4, 286, *post*.

Legal assets are subject to distribution according to the statute. 2 M'Cord's Ch. R. 466. But the doctrine, as to distribution *pari passu*, of the equitable assets, is not affected by the statute.—4 John. Ch. 651—See title "Marshalling Assets," *post*.

§ 25. Legal assets are first liable for payment of all liens existing before the death of the debtor, before distribution among creditors under the executor's law.—2 M'Cord's Ch. R. 466—And an order for distribution will not be made, before the payment of all debts, unless the executors are secured. *Ibid*. 430.

§ 26. In paying debts, the following order must be observed:

1st. Personal estate, except specific legacies, and such as is exempted.

2d. The real estate, if any, appropriated by the will, as a fund for the payment of the debts.

3d. The descended real estate, whether acquired since the will or not.

4th. The land specifically devised, though *generally* charged with payment of debts, but not *specifically*.—3 John. Ch. C. 312; 6 Mass. R. 149.

§ 27. In all cases, the personal estate is to be first applied to the payment of debts and legacies, unless charged on the real estate by the express words of the will.—8 Pick. 29. The mere charging a secondary fund with debts, does not exempt the primary fund, or postpone its application, unless it is manifest the intent of the testator to exonerate it for the benefit of the residuary, or some other person.—3 Wend. 503; 5 Paige, 318. And when such intent is manifest, a lapse of the residuary bequest restores the residuary fund to its primary liability. 3 Wend. 503. See p. 160, 161, *ante*.

Even chattels specifically devised, are liable for the debts before real estate, unless otherwise directed by the will. 1 Paige, 270.

§ 28. In case of the exemption of the personal estate by the testator's will, or of its insufficiency, the real estate or land of the testator or intestate may be sold.

The modes of selling both the real and personal estate of a decedent, being generally regulated by statute, in each State, the directions of the statute in Mississippi will be selected as most appropriate to this work, and will form the subject of the next chapter,—in connection with such decisions of various Courts as are applicable.

CHAPTER XLII.

EXECUTOR'S AND ADMINISTRATOR'S SALES.

§ 1. The will of a testator is a law to his executors, from which they ought not to swerve, unless specially authorized by some proper tribunal. Cox, 210; 6 Halst. 145.

An executor has not ordinarily any power over real estate.--- His powers are derived from the will—and he can do no valid act beyond his authority. Where a will contains no special provision on the subject, the land of the deceased descends to his heirs. This right cannot be divested or impaired by unauthorised acts of the executor. 15 Peters, 93; How. & H. 190.

But a will may confer power on an executor to sell real estate without a license of court;—and if conferred on several, and one or more refuses or neglects to qualify, a sale by the residue, who do qualify, is valid. 14 Wend. 90; 2 Green, 283; ib. 373.

And where executors are also residuary devisees and legatees, and have given a bond for the payment of debts and legacies of the decedent, they acquire thereby an absolute title to the estate devised, and may sell the real estate of the deceased and give a good title, without license therefor from the court.---16 Mass. 172; 5 Pick. 337. (And where such executors failed to pay all the debts of the deceased, it was *held*, that a license to an administrator *de bonis non*, to sell the decedent's real estate for such purpose, after the statutory bar had intervened, was void. 16 Mass. 172.)

§ 2. The will being the law of the executor—therefore, where a will confers a power to sell land on an executor, and the power is *special*, it can be exercised only in the mode prescribed by the testator---2 Paige, 202. Therefore, where an executor is authorised to sell an estate, at public vendue, to pay off the legacies to the children of the testator as they become of age, and he sold the property at private sale, to raise money for his own use, before the legacies became payable, the sale was held to be void. *Ibid.*

So, a power to sell, does not authorise a *barter*, or exchange.—1 Ohio R. 232. But a power to executors to raise money on real estate for the benefit of creditors, without specifying *how* it was to be raised, was held to authorise them *to sell* for that purpose.—2 Humph. 357—See 167, 168, 169, *ante*.

§ 3. An executor, not authorised by the will to sell real estate, and an administrator, may obtain a license to sell it for payment of debts and legacies where the personal estate is insufficient.

Lands descend to the heir, liable for, and subject to be sold for the ancestor's debts. An administrator has only authority to sell under an order of court. This power rests not in *his* discretion, but is conferred by the court, in a state of things prescribed by law.—2 Peters, 492. The order of the court is a prerequisite indispensable to the very existence of the power;—and if the law authorising the court to grant the order, is repealed, the power to sell can never exist. The repeal of such law divests no vested right, but is a power which every legislature possesses.—2 Peters, 523.

A court of Probates cannot legally appoint any other than the executor or administrator to sell the real estate of the intestate; and if a sale be made by a stranger, pursuant to a decree of probate, his account for commissions and expenses cannot be allowed. 4 Day, 137; 12 Mass. 503.

§ 4. In Mississippi, it is enacted, that “when any executor, or administrator, shall discover, or believe, that the personal estate of the testator or intestate is insufficient to pay the debts of the deceased, it shall be his duty, as soon as may be, to exhibit on oath, a just and true account of said personal estate and debts as far as he can discover the same, to the Orphan's court of the proper county, and said court shall cause citation to issue, directing all persons interested, &c. to appear, &c. not less than forty days, after issuing the citation, to show cause why so much land shall not be sold, as may be sufficient to pay debts, &c.; which said citation shall be set up in three of the most public places, &c. for thirty days, and published in a newspaper the same number of days.” How. & H. sec. 76, p. 407.

§ 5. A Surrogate obtains jurisdiction in reference to the sale of the real estate of a testator or intestate, by the presentation of a

petition by the executors or administrators praying his aid, and by the exhibition of an account of the personal estate and debts of the deceased. 10 Wend. 441.

§ 6. A general power to sell, for payment of debts, given by the court of Probates to an administrator, authorises him to execute such an instrument only, as is legally proper for conveyance of the estate to be sold. 4 Connt. 495.

To render a sale by an administrator valid, the deed must recite the order of the court, and so certainly as to be visibly in conformity to it.—6 Connt. 373. The authority is personal, and must be strictly pursued. *Ib.*—7 Mass. 488; 3 Stew. & Port. 355.—Therefore, where an administrator was licensed to sell land to a certain amount, and sold the entire real estate, the sale was *held* to be void, though such real estate was under a mortgage.—15 Pick. 23; 6 Connt. 373; 4 N. Hamp. 166.

So, in case of a sale under a license of court, those interested in the estate are not concluded by the sale, unless every essential requisite of the law in regard to such sale, has been complied with. 7 Mass. 488; 11 *ib.* 227; 1 How. 558: 1 Sm. & M. 357; 2 *ib.* 326.*

A power to sell for payment of debts, does not authorise sale for payment of legacies. 2 Dall. 291.

A sale by an administrator, was held valid against the heirs, though made by virtue of a license granted on a certificate of the Judge of Probates, not authorised by the circumstances, and where the administrator gave no bond as required by the statute.—11 Mass. 227; 7 *ib.* 292; 5 Pick. 140—But see 3 Stew. & Port. 355.

A license need not specify the particular land to be sold.—3 N. Hamp. 30.

A sale made by an administrator, if advertised for Friday the 17th, when Friday was the 16th, and the mistake was not corrected till the last publication made on the day of sale—was held to be void on account of the mistake. 15 Mass. 326.

But under the statute of 1783 and 1788, (in Massachusetts,) relating to notices by executors and administrators, upon license to

*Long acquiescence in the possession of a purchaser, with other circumstances showing fairness and publicity of sale, will be sufficient to raise a presumption, that these requisites were complied with. 3 Mass. 399; 15 *ib.* 26.

sell real estate, notices of sale published three weeks successively, pursuant to order of court, are sufficient, though neither of the notices were published 30 days before the sale. 1 Mass. 247.

An administrator is not bound to state in his advertisement the terms of the sale, nor is it unlawful in him to exact payment in specie, or in such bank notes as are in best credit---16 Mass. 129.

The oath required by the statute must precede the fixing of the time and place of sale, and not only the execution of the deed to the purchaser---7 Pick. 111.

A sale made twelve years after the order, was held void---15 Mass. 326---No time being fixed by statute for such sale, each case must depend on the discretion of the court---6 Halst. 44. The Orphan's court may make a second order for the sale of real estate, the first being insufficient for the payment of the debts. *Ibid.*

Executors and administrators may divide and sell the land in parcels, though appraised entire; and their deed will convey a title without report or compensation---9 Ohio R. 19; 7 Ham. (part 1st) 198.

They may, *bona fide*, adjourn the sale, without any statutory authority so to do. 15 Mass. 175.

§ 7. An administrator cannot make any contract for the sale of the lands of his intestate---1 Bailey, 45---and any contract made before such order, is void;---and even if he afterwards gets the order, it will not enure to the benefit of his covenantee---3 Cowen, 299; 3 Paige, 154; 4 Mass. 354; 1 ib. 35. For the administrator has no interest in the land till the order of sale is made. *Ib.* and 16 Mass. 280; 1 Pick. 157. And such contract is also against the policy of the act authorising administrators to sell land---3 Paige, 154.

The cases which hold that where one conveys without title, and afterwards becomes the owner, this shall enure to the benefit of the grantee, means that the grantor shall acquire a beneficial interest and not a mere authority to sell. 3 Paige, 154.*

*Lands may be sold under a judgment against an executor or administrator, but when there is neither, a bill will lie against the heir---for the proceeds of land sold by him, the personalty being exhausted---2 M'Cord's So. Car. Ch. R. 514---sed quere?

§ 8. An administrator cannot sell the real estate of his intestate for payment of debts, unless his intestate died seized of it, or had fraudulently conveyed it away, or was colorably or fraudulently disseized of it. 5 Mass. 240; 4 ib. 354.

A sale of land adversely held, is champertous and void in equity---9 Yerg. 301; 3 S. & R. 473---Nor should a sale be made by an administrator of land, while a cloud rests on the title. 9 Yerg. 301.

But if the executor be a son and heir of the testator, he may pass the title, as such heir, to lands of which the testator was disseized. 10 Mass. 131; 16 ib. 172; 5 Pick. 337.

And the authority of an executor or administrator to sell the land of his testator or intestate, by law liable to such sale, for payment of debts, is not taken away, by the disseizin of, descent from, or alienation by the heirs or the devisees. 4 Mass. 354; 5 ib. 240; 3 ib. 523---So, in N. Jersey---1 Halst. 44; 6 ib. 1.

But a repeal of the law authorising sale of land by administrators, for payment of debts, would take away his authority---3 Ham. 579. Neither the interest of the personal representatives or creditors is such as to prevent the Legislature from repealing laws authorising such sales. *Ibid.*

§ 9. Where a testator directed his debts to be paid, and made a *specific devise* of certain land, and gave over the residuum, and died seized of real estate *acquired after making the will*, and which did not pass thereby---upon the application of executors for license to sell real estate for the payment of debts, it was held, that the lands not included in the specific devise, and which would otherwise fall into the residuum, should first be sold, and next the after acquired lands. 6 Mass. 149.

§ 10. An administrator selling real estate under an order of court, may convey to the assignee of the original purchaser.---7 Ham. (part 1st) 198.

The authority of an administrator to convey land must appear on the deed of conveyance with such certainty, that the act done shall be clearly in pursuance of the authority given.---6 Connt. 373. Therefore where a grantor described himself in a deed as administrator, and referred to an order of the court of Probates as

the source of his authority, and then granted the estate with a covenant that he was seized as administrator and other covenants, it was *held*, that such deed was ineffectual to convey the estate, and that the defect could not be supplied by recurrence to the Probate records. *Ibid.*

But it is not necessary to specify in such deed the ground on which the court of Probate proceeded, in making the order of sale, although the legal necessity of the sale must appear on the face of the order. 10 Conn. 77.

An administrator's deed need not recite that the sale was at auction, nor that the grantee was the highest bidder; nor need it be signed by the administrator, if the capacity in which he conveys appears in any other part of the deed. 3 N. Hamp. 30.

§ 11. A deed by an administrator, under a Probate order of sale for the payment of debts, must be adapted to convey the estate, which is the subject matter of the power---6 Connt. 258.—Therefore, where an administrator reciting his power under an order of Probate, naming himself as administrator, and signing with that addition to his name, executed a quit claim deed, releasing his right and title to the premises, described by metes and bounds, as being the same of which the intestate was seized and possessed at his decease—it was *held*, that the administrator had himself no interest in the land, and that such deed was inoperative.---*Ibid.* A sale by an administrator only vests in the purchaser the title of his intestate. 6 Halst. 44.

And where one selling described himself administrator of the intestate, stated his power to sell as derived from the court for that purpose, and signed the deed with the addition of administrator to his name, and covenanted therein as follows—"I the said grantor, do for myself, my heirs, executors and administrators, covenant with the said grantee, his heirs and assigns, that I am well seized," &c.—*held*, by such covenant the grantor was *personally* liable. 4 Connt. 495.

And where land was held by C., the heirs of A. and the heirs of B., in equal proportions, and the administrator of A.'s estate acting as such, under a general order of sale for payment of debts, and in possession of the land described, covenanted in a deed

that he was well seized of the premises in fee simple, and had good right to sell the same;"—and the deed purported to convey by metes and bounds a part only of the land so held in common—*held*, no title passed, the grantor having power legally to convey an *undivided* portion of the whole estate held in common, and that therefore the covenants were broken instantly on the execution of the deed.—4 Connt. 405.—Such sale is judicial, and the maxim, *caveat emptor*, applies. 3 Watts, 490; 3 Watts & S. 444.*

In an action on a bond given by a purchaser at such sale, for part of the purchase money, the defendant cannot allege a defect of the title as a defence. 3 Watts, 490.

And a representation made by an administrator, touching the character of the land of his intestate, made, previously to a sale thereof, by order of the Orphan's court, will not authorise the purchaser to resist the payment of the purchase money, in the absence of fraud. 6 Watts, 148.

§ 12. Where a testator directed his lands to be sold, and the executor sold accordingly, the will being lost—*Held*: the executor had a right to resort to Chancery, to have trespassers removed, to enable him to convey title and deliver possession. 3 Humph. 347.

Where the administrator or trustee cannot perform the duties imposed by the will without having the legal title to the property, he will be considered as taking the title. 9 Shepley's R. (22 Maine R.) 257—Bost. Law. Repr. June, 1845.

§ 13. In South-Carolina, purchases by an executor, at his own sale, are void, and voidable in the hands of a purchaser from him, with notice express or implied—1 M'Cord's Ch. R. 252—for an administrator is trustee—2 Halst. 185—and as such cannot speculate for his own profit—Coxe, 26; 6 Halst. 145; 3 Harris. 74.—(The rule is the same in N. Jersey.—*Ib.*) And a deed of an ex-

*If administrator selling, by leave, lands of his intestate, take a mortgage for the security of the purchase money, on foreclosure, the title to the mortgaged property vests in him individually, and not as administrator, so that his subsequent deed will convey his individual title, and their covenants bind him in his individual capacity—and this though in the mortgage and deed he be described as administrator. 1 Chip. 409.

ecutor (empowered to sell real estate by will,) to a third person for the purpose and with the intent of such third person reconveying it to the executor, is voidable by the *cestuys que trust*, or their heirs. 6 Halst. 385; 3 Iredell, 516.

So, (in S. Carolina,) where an executor, who was also legatee, purchased at his own sale made under an order of the Ordinary, and appointed an agent to sell and another to buy—his purchases were set aside by Chancellor Johnston, on the general principle, that for the prevention of fraud, a trustee to sell shall not be permitted to buy at his own sale; and if he does, his purchase may be confirmed or set aside at the option of the parties interested---2 Hill's Ch. R. 434---and if for less than the appraised value, the administrator shall account for the difference between his bid and the real value, and a re-sale shall be ordered---*Ib.*—and if more is bid than at the former sale, it shall go to the highest bidder; if not, the first sale is affirmed.---*Ib.* 436—See also 2 Bailey, 480; 7 Pick. 1; 15 *ib.* 23; 5 *ib.* 519. And if the heirs elect to consider him trustee, they must do so, not only for lands resold by him, but for those not resold. 10 Pick. 77.

In the case of 6 Halsted, 385, above cited, it is said, the expression in 2d Halsted that such sales are void, is too strong—such sales are *voidable*, not void. They may become valid by the acquiescence of the heirs. Third persons cannot question them. Neither could the executor, nor any person claiming under him. *Ibid.* A person having a right to impeach it, may urge his objection in an action of ejectment. *Ibid.*

So, in Ohio, an executor cannot purchase at his co-executor's sale, but the subsequent assent of the heirs will make his purchase good. 10 Ohio R. 117.

In North-Carolina, an executor can purchase goods of a testator at his sale---2 Dever. 19—But see 3 Iredell, 516, where it is said—If an executor or administrator at his own sale, procure an agent to buy for him any part of his testator's or intestate's property, and then to reconvey it to him, he shall account for the full value of such property, or for such higher price as he subsequently obtained for it, beyond the amount bid by his agent.

In Pennsylvania, an executor or administrator cannot purchase the land of his intestate sold by order of the Orphan's court---2

Yeates, 117; 1 Ash. 307; 2 Rawle, 392. But such a sale is not *void*, but voidable. It may be ratified by those entitled to call it in question;—but a ratification by the heirs and devisees, will not prevent the creditors of the deceased from taking the land in execution as his estate. 2 Rawle, 392—See also 2 Miles, 383.

If the administrator has purchased at a price below the value of the estate, and sold to a third person without notice, the court will order him to pay to the estate the difference between the price paid by him and its estimated value. 1 Ash. 307—see also 2 Binney, 294, & 2 S. & R. 521; 6 Har. & John. 67; 5 N. Hamp. 492; 2 ib. 218; 4 Gill. & John. 376; 2 Root, 473.

Where real estate of an intestate was ordered by the legislature of Rhode-Island to be sold, by a person appointed by the legislature, for payment of the intestate's debts, the general administrator on the estate may be a purchaser at the sale. 2 Mason, 531.

And if property of a decedent be sold by order of court, and by the sheriff or other public officer, the executor may purchase it for less than its value, if he can; but if not by order of the court and the sheriff, he shall answer for its full value—2 Hayw. 461—So, if under execution against the intestate by the sheriff.—2 Halst. 180.

In Mississippi, it has been decided that the purchase of property by an administrator at his own sale, is *voidable*—1 Sm. & M. 208—whether absolutely *void*, the court, in this case, did not think it necessary to determine.

§ 14. The Probate court may vacate a sale for fraud, made under its direction, when application is made at the term, to which a report of the sale is made. 3 Sm. & M. 302.

And although when an order of sale has been made, it seems, the question of its propriety or authority, should be closed—2 Sm. & M. 326. Yet a sale is not final, till reported to the court, and there is a judgment of the court ratifying it. *Ibid*.

§ 15. The Legislature may also order a sale of real estate. The Legislature regulates descents and conveyances of real estate, and to define the rights of creditor and debtor is their common duty, and the whole range of remedies lies within their province. 16 Peters, 25.

And where a sale of the property of an intestate is made by authority of an act of the Legislature, the terms must be strictly complied with, or the sale will be void.---3 Sm. & M. 715. If regular, the sale will be good. *Ibid.*

If the act required the administrator to give a bond conditioned "to vest the proceeds in other property," an omission to give such bond will make the sale void.---*Ibid.* A purchaser thereat will be regarded as trustee for the heir; and a purchaser, without notice, from the first purchaser, will be regarded in the same light. *Ibid.*

§ 16. In Mississippi, it is further provided, that "when the estate of any deceased person, or the property of any minor or minors, shall consist of lands or other real estate, and slaves or other personal property, and the Probate court of the proper county shall be of opinion that the interest of the said estate, or the said minor or minors, will be promoted by the sale of the lands or other real estate in preference of the slaves, or other personal property, the said court may, at its discretion, order the sale of said lands and other real estate, instead of the slaves and other personal property, on such credit, not exceeding *four* years, as the said court may be of opinion, will best promote the interest of the said minor or minors, the purchaser giving bond and security, as required in other cases of the sale of property of deceased persons." How. & H. p. 417, act of 1829. As to right of the Legislature to subject land instead of personal estate, see 16 Peters, 25, and preceding section.

§ 17. And it is further enacted, that "where land, tenements, and hereditaments, shall descend from a person dying intestate, and an equal division thereof cannot conveniently be made, it shall be lawful for the (court of Chancery,* or) Orphan's court" (now court of Probates,) "of the county by which the administration of the estate of the intestate was granted, to direct the sale of such lands, tenements or hereditaments, and the distribution of the money arising therefrom, according to the rights of each claimant." How. & H. 409, act of 1821.

*Repealed by Constitution of 1832—because ample jurisdiction is thereby conferred on the Court of Probates—and Chancery cannot interfere.

§ 18. And "when hereafter any executor, administrator or guardian, or other person interested in the lands, tenements, and hereditaments of any person deceased, shall suggest to the Probate court of any county in this State, that it will be for the interest of the devisees, heirs, or other legal representatives of any such decedent, to sell the whole or any part of such lands, tenements or hereditaments, and shall make application to any such Probate court to order the sale of the same, it shall be the duty of such court, forthwith, to issue a citation, directing all persons in any manner interested in said lands, tenements or hereditaments, to appear before said court, at a day to be named, *not less than sixty days* after the *time of issuing* such citation—to show cause why such lands, tenements and hereditaments, should not be sold;—and it shall be the duty of the executor, administrator or guardian, or other person making such application, to advertise in *two* of the most public newspapers printed in the State, for a period of *six successive weeks*, a notice to all persons interested in such lands, tenements and hereditaments, specifying the same particularly in said notice, to appear at the court at which such citation is returnable, to show cause, if any they can, why said lands, tenements and hereditaments, shall not be sold. And upon the return of such citation executed, if the parties to whom it is directed reside in the State, or upon proof of such publication as aforesaid, the said court is hereby authorised and empowered, if they shall be satisfied from all the proofs exhibited, that the interest of the heirs, devisees, or other persons interested in such, tenements and hereditaments, will be promoted by selling the same, to order the same to be sold on such credits and terms, as they shall deem most advantageous to those interested—*Provided*, however, that no such lands, tenements and hereditaments, shall be sold on a credit for a shorter time than *twelve* months." Act, 1830—How. & H. 418.

The said court, at the time of ordering the sale of any such lands, tenements and hereditaments, as aforesaid, shall take *bond* with good and sufficient security, from the executor, administrator, guardian, or other person petitioning for any such sale, in a sufficient penalty, conditioned to apply the proceeds of said sale in the same way the lands, tenements, or hereditaments, would

have descended, been applied or appropriated, if no such order of sale had been made. *Ibid.* 419.

§ 19. Another instance, in which the interest of an intestate may be sold by order of the court of Probates, is where lands had been entered prior to the year 1827, under the laws of Congress, allowing the purchase money to be made in instalments—and the purchaser died before all the instalments were discharged. In such case, if “it shall appear to the satisfaction of the Probate court, that the said lands cannot be relinquished”—(according to the provisions of the several acts of Congress, relative to the relief of purchasers of public lands)—“without injury to the estate, the said court might direct the same to be sold.” How. & H. p. 417.

The occasion which gave birth to this provision, having long ceased to exist, the provision itself may be considered obsolete.

§ 20. But another instance of frequent occurrence, is “where land, tenements and hereditaments descend from a person dying intestate, and an equal division thereof cannot conveniently be made”—in which case, it is provided, that “it shall be lawful for the Orphan’s court (court of Probates) of the county by which the administration to the estate of the intestate was granted, to direct the sale of such lands, tenements or hereditaments, and the distribution of the money arising therefrom, according to the rights of each claimant.” Act, 1821—How. & H. 409.

By another law, the land of minors may be sold—How. & H. 338—which will be treated of under the title of “Guardian and Ward,” *post.*—So, of law respecting sale of land belonging to lunatics and idiots.

Another law authorises Probate court to sell land held in joint-tenancy, of which an equal division cannot be made.—How. & H. 420. The subject of this act will more properly fall under another head.

§ 21. In reference to the sale of real estate for payment of debts of intestate, when the personal estate is insufficient—(see *ante*, sec. 4, p. 286)—it is further provided, that—

“The Probate court, shall at the time specified in the said citation, or at such other time as it may then appoint, hear and examine the allegations and proofs of the said executor or adminis-

trator, and of other persons interested. And if the said court, in such examination, shall find that the personal estate of such testator or intestate is not sufficient to pay his or her debts, the said court shall order and direct the administrator or executor to sell the whole, if necessary, of the lands, tenements or hereditaments, for the payment of his or her debts, or so much thereof as will be sufficient for that purpose—and, when a part only, the said order shall specify that part—*Provided*, that when any houses, lots, or lands, are so situated or circumstanced, that a part thereof cannot be sold without manifest prejudice to the heirs, or devisees, the said court may, at its discretion, order the whole to be sold, and the overplus, arising from such sale, shall be distributed among the heirs or devisees, according to the law of descents in the former and the will in the latter case;—and the heir or devisee, whose lands, tenements, or hereditaments, so descending or devised, shall be sold as aforesaid, for the payment of the debts of the testator or intestate, may compel all others claiming or holding under such intestate or testator, to contribute in proportion to their respective interests. How. & H. p. 408—Act, 1821—See sec. 27, p. 299.

§ 22. Any executor or administrator, who may be ordered to sell the lands, tenements, or hereditaments, of any testator or intestate, shall give notice, by advertisements, put up at three or more public places in the county where such lands, tenements or hereditaments are situate, of the time and place of selling the same, at least *forty* days before the time of sale, and by publishing such advertisements in *one* of the public newspapers of this State, for *three* weeks successively before such days of sale;—and shall, at the time and place appointed, set up the said lands, tenements and hereditaments, for sale, at public *vendue*, upon a credit of *twelve* months from the day of sale—and strike off the same to the highest bidder, who shall give *bond*, with satisfactory security, for the amount thereof;—and the executor or administrator making such sale, shall make report in writing, of all the proceedings thereon, to the next Probate court after such sale—*Provided*, that such executor or administrator may adjourn the said sale from time to time, not exceeding *forty* days in the whole. How. & H. 408—Acts, 1821—(See sec. 27, p. 299.)

§ 23. "The said executor or administrator shall, and is hereby authorised to make a deed or deeds to the purchaser, or purchasers, to the lands, tenements and hereditaments so sold—which deed or deeds shall vest in such purchaser or purchasers as good and perfect an estate in the premises therein mentioned, as the heirs or devisees of such testator or intestate, were seized of, or entitled to, at the time of making the said order of sale, by the said Probate court." How. & H. 409—See *ante* sec. 11, p. 290.

§ 24. "When any real or personal property, or both, of any deceased person, or of any minor, shall be sold by order of any court of Probate, on a credit, the property shall be held, and remain subject and liable to the payment of the sum or sums for which it was sold, and the interest and costs accruing thereon, in preference of any other claim or claims against the purchaser of such property, or the assignee of such purchaser, and shall be liable to the payment thereof, *in the same manner* as if a *mortgage* had been taken on the said property to secure the payment thereof, any law, usage, or custom to the contrary notwithstanding." *Ib.* 417—See sec. 29 & 30, p. 300.

§ 25. "No executor or administrator shall require any bond or note, payable at the Bank of the State of Mississippi, or any other Bank in said State, for property belonging to the estate of any testator or intestate which such executor or administrator may sell at public sale by order of the Probate court." *Ibid.* 414—Act 1821—See sec. 6, p. 288.

§ 26. "No sale by an executor or administrator shall commence before the hour of twelve o'clock on the day appointed for the same, nor continue longer than the hour of *five* o'clock of the same day. But in case that time shall be insufficient to complete the sale of such estate, the executor or administrator may continue the sale from day to day, until the whole of the estate ordered to be sold is disposed of, by giving *public* notice thereof to the *attending* company, at the conclusion of the sale on each day—and such sale shall commence and end on each day within the hours aforesaid;—and any such sale which may be conducted in any other manner than herein directed, is hereby declared to be null and void. *Ibid.* 414—Acts 1821—See sec. 6, p. 288.

§ 27. Administrators are prohibited by statute from selling the property of their intestates in any other manner than at public sale---1 How. 559. The acts of administrators are only legal so far as they are in pursuance of law.---*Ibid.* And a vendee does not acquire any right to property sold by an administrator at private sale.---*Ibid.* But where the administrator, in right of his wife, had an interest in the property sold, a vendee would acquire a right to that extent.---*Ibid.*—See also 2 How. 822; and 6 How. 106—and see sec. 6, p. 287.

The decree of the Probate court without notice, actual or constructive, to the heirs, is void, and inoperative. Such decree is not only against the express provisions of the statute, but opposed to the first principles of justice. Without citation or notice, the court had no jurisdiction of the person; and without jurisdiction as well of the person as of the subject, the judgment of a court is void, and may be collaterally assailed. 6 How. 114, citing 4 Pet. 474; 11 Wend. 652; 2 Stew. (Ala.) R. 335, and 3 J. J. Marshall, 105. In such case the title, by law, continues in the heirs. *Ibid.*—6 Sm. & M.

If an administrator sell the land of his intestate under an order of the Probate court, when the record does not show that legal notice had been given to the heirs at law, both the order and sale are void.---1 Sm. & M. 351. Any sale of the real estate of decedents must be made in strict compliance with the law, or it will be void.---*Ib.*—& see 2 Sm. & M. 326—See sec. 6, p. 287-8, *ante*.

§ 28. A sale by an administrator, unless for the purpose of paying debts, or enabling him to make distribution, is absolutely void. In such case the vendee of the administrator, with notice, would be compelled to yield the property purchased, to the right of the distributees. (But if a purchaser without notice, *quere?*) A court of Chancery in such case has jurisdiction to enforce the right of the distributees, the court of Probate having no jurisdiction from the character of the party. *Aliter*, if the administrator were the only party. 1 Sm. & M. 208; *Ibid.* 221—See sec. 6, p. 287-8, *ante*.*

*A power to sell at auction is executed where the property is advertised for sale, and an offer being made by letter, it is subsequently put up, and no one bidding

An order to sell lands of the intestate, except certain land of a specific character, will not justify a sale of land of the order excepted. 4 Ham. 5.

§ 29. Under the act, (sec. 24, p. 298, *ante*,) real and personal property, sold by order of a court of Probate will remain, whether in the possession of the purchaser or his assignee, bound for the purchase-money as if specially mortgaged therefor; and the lien thus created, is considered as if recorded, and therefore constructive notice to third persons.---2 Sm. & M. 687. So, if the administrator himself be the purchaser. 1 *Ib.* 208, 221.

But, it has been decided elsewhere, that if an administrator selling, by leave, lands of his intestate, for the security of the purchase-money *take a mortgage*—on foreclosure, the title of the mortgaged premises, vests in him in his *individual*, not his official capacity, so that his subsequent deed will convey his individual title, and their covenants bind him in his individual capacity—although in such mortgage and deed he be described as administrator. 1 Chip. 409.

The statutory lien cannot be discharged by any act of the administrator, other than receipt of the money. 1 Sm. & M. C. R. 172.

An administrator is always presumed to have received the proceeds of real estate sold by him, unless he show the contrary.—3 Sm. & M. 473. He will not be liable beyond the amount received, *provided* he took security, good at the time, and the loss was unavoidable. *Ibid.*

§ 30. An administrator can substitute no other security for the bond and security required by law. If he take of the purchaser a note executed by a third person and endorsed by the purchaser, and neglect to collect it, the statutory lien continues, and the bond of the purchaser (which ought to have been taken,) remains unsatisfied.---1 Sm. & M. Ch. R. 172. Nothing short of an absolute liability on the part of the purchaser, satisfies the law, which requires a stable security, leaving to the administrator no discretion, except perhaps that of approving the securities on the purchas-

so much, it is afterwards conveyed, according to the offer in the letter. 3 Bibb, 367.  This note should have been appended to sec. 7, p. 288, *ante*.

er's bond. The law commands but one mode, (and that excludes all others,) of securing the purchase money, and a discretion in the administrator to select any other mode would prove extremely hazardous to the interest of all concerned in the estates of deceased persons. *Ibid.*

Hence, an executor or administrator, who sells the property of his intestate and takes insufficient security for the purchase, is liable for the amount lost thereby, if he do so from bad faith, and not otherwise.---1 Sm. & M. 508. If, however, he took no security at all, there would be no question about good or bad faith, and he should be rendered liable at all events, for he was not bound to make a deed or deliver the property without requiring a compliance with the law from the purchaser; and if he does so, it is at his own risk, because he, and not the law, reposed such confidence in the buyer. In such case, the law presumes neglect or bad faith, either of which is a breach of an executor's or administrator's bond. See 3 Sm. & M. 473.

§ 31. For the rule where two or more executors are authorised to sell, see ante pages 166 and 174, inclusive.

§ 32. This chapter will close with a few miscellaneous examples on the same subject, not embraced in the foregoing sections.

An executor who is residuary devisee, and gives bond for the payment of debts and legacies, becomes absolute owner of the real estate devised, and may sell it. 5 Pick. 337.

An executor authorised by will, to sell lands, cannot make an attorney to convey. Harp. 411—see 12 Mass. 503.

A power to two executors, to sell and dispose of an estate in such way and manner as they shall judge most beneficial to the legatees, will not give one of them alone a power to sell, nor will it authorise one or both, to enter upon and occupy the estate.—3 Day, 384.

A license to sell real estate, to pay a debt barred by the special statute of limitations respecting executors and administrators, is void.---5 Pick. 140. The administrator is bound to plead such statute in bar of a debt of his intestate. *Ibid.*

Where a sale of land by executors was made for the benefit of one of the executors, it was held to be void. 4 Har. & J. 186.

An administratrix, having obtained a license to sell the real estate of her intestate, whose estate had been represented as insolvent, employed an agent to sell the estate at auction. The lands brought less than their value, and the agent had become interested in the purchase of them. It was *held*, that unless the administratrix called her agent to an account, she would be considered as conniving with him, and would be chargeable in the settlement of the account of her administration with the full value of the land. 2 N. Hamp. 225.

An executor purchasing the land of his testator, takes it subject to the execution of a creditor of the estate, even though the heirs have assented to the sale. 2 Rawle, 392.

An administrator of an insolvent estate, by leave, sold the real estate of his intestate, and accounted for the proceeds. On subsequently discovering that he had filed no bond in the office before the sale, he was permitted to charge back the amount in his account and have a new license to sell. 2 Fairfax, 247—and see 1 Connt. 51.

A sale of an intestate's real estate, made by an administrator, upon a joint application with guardians, not to pay debts, but to maintain children and improve the property, is not valid.—5 Ham. 447.

Where real estate is devised to executors, with power to sell the same and distribute the proceeds, if they die without conveying, the estate descends to the heirs-at-law, and a conveyance from them passes the estate. 4 Wend. 672.

Where an administrator had demands against the intestate, and had made advances to the estate out of his own funds, but had rendered no account till after the *four* years had elapsed, the delay having been occasioned by an attempt to collect a debt abroad, he was licensed to sell real estate, on his application therefor, made soon after the expiration of the four years, the real estate having remained without conveyance, or partition among the heirs. 2 Pick. 567.

A license to sell was refused where it appeared that the only debt due was secured by a mortgage, that the mortgagee was in possession, that the four years had elapsed, that there was no judg-

ment for the debt, and that the heirs offered to save the administrator harmless. 13 Mass. 162.

If an administrator, under license for that purpose, sell real estate of the intestate to a certain amount for payment of debts, and afterwards refuse to receive the purchase-money, and to execute deeds of the land sold, this is mal-administration—to which his administration bond, (under stat. of Mass. 1803,) does not extend, but the remedy is by petition to the Judge of Probate for his removal. 1 Greenl. 139.

A covenant by an executor that he conveys *as executor, and not otherwise*, does not bind him individually, although it may not be binding on the estate of the testator. 1 Gall. 37.

CHAPTER XLIII.

EXECUTOR'S AND ADMINISTRATOR'S SALE OF PERSONALTY.

§ 1. It shall not be lawful for any executor, or administrator, to take the estate or any part thereof, of any testator or intestate, at the appraised value, or to dispose of the same at *private* sale, except where the same is directed by the will of the testator, or provided for by this act. But in all cases where it may be necessary to sell the whole or any part of the personal estate of any testator or intestate, it shall be the duty of the executor or administrator, to apply to the Probate court of the proper county for an order of sale, and on obtaining the same, to advertise the time and place of said sale in *three* or more public places in the county, at least *thirty* days previous to the day of sale, and then and there proceed to sell the same at public sale, to the highest bid-

der giving at least six months credit, the purchaser or purchasers giving bond with approved security. How. & H. 411—Act 1821.

§ 2. If any executor, administrator or collector, shall be of opinion, that it would be of advantage to the estate of the testator or intestate, to dispose of the *crop growing* at the *time* of his or her *decease*, it shall be lawful for the Probate court of the proper county, on the application of such executor, administrator or collector, to order the sale of such crop, either at *public* or *private* sale, on a credit of six months, taking of the purchaser or purchasers good and sufficient security for the purchase-money.—But if the said court, on hearing, should be of the opinion that such sale would not be of advantage, &c.—(See *ante*, page 267, sec. 5.)

§ 3. Executors, administrators and guardians, may sell for cash, or consign for sale, the crop or crops of cotton and corn, they may have charge of, provided they obtain an order from the Probate court of the proper county. How. & H. 416—Act 1826.

§ 4. When one or more slaves shall descend from a person dying intestate, and an equal division cannot be made thereof in kind, on account of the nature of the property, it shall be lawful for the court of Chancery, or Probate court of the proper county, by which the administration to the estate of the intestate was granted, to direct the sale of such slave or slaves, and the distribution of the money arising therefrom, according to the rights of each claimant—provided *always*, that each claimant shall be first duly summoned to show cause, if any he can, against such sale. How. & H. 402—Acts 1821.

§ 5. Whenever any person shall have purchased land of the United States, and shall die before the payment therefor shall be completed, his or her executor or administrator shall be, and he is hereby authorised and empowered, to sell by order of the Probate court of the proper county, any property belonging to the estate of the deceased, giving public notice of the time and place of said sale, and upon such terms as shall be prescribed by the said Probate court, and to apply the proceeds of such sale to the payment of said land. Provided nevertheless, this shall not extend to cases where the testator or testatrix shall have made pro-

vision for the payment of such land, by his or her last will and testament---How. & H. 407---Act 1821---it is provided that the land itself may be sold. How. & H. 407 & 417.

§ 6. The manner and time of conducting the sale of property of an intestate, is set forth in Sec. 26, p. 298, *ante*—to which the reader is referred.

The decisions of the courts respecting the validity of sales of real estate, are, for the most part, applicable to sales of personalty. The reader is therefore referred to the next preceding chapter, ending with the 30th section.

In conclusion, will be annexed some additional decisions.

The power given to the Probate court, to order sales by an executor or administrator of his testator's or intestate's property, is a special power, and must be strictly pursued. 1 Sm. & Marsh. 561.

A particular statement of *all the administrator's acts in conducting the sale*, must be contained in his report; and if not conformable to the statute, the sale will be void.---1 Sm. & M. 208, 172; 2 ib. 326, 527. And such acts must cover *all* the requisitions of the statute, and so appear in the report.—*Ibid*. If the administrator does not report, the court may compel him. When his report is made, objections may be made to the legality of the proceedings. That is the only proper time for the court to set aside the sale for illegality. 2 Sm. & M. 326.

CHAPTER XLIV.

ADMINISTRATION—AUTHENTICATION OF DEBTS.

§ 1. No executor or administrator shall discharge any claims against the deceased, (except at his own risk,) unless the same be allowed by the court, or unless the same shall be authenticated and proved, as is required by law. (See How. & H. sect. 69, p. 405.)

JUDGMENT OR DECREE.

I.—1st. If the claim against the estate be a judgment or decree, the evidence shall be “a short copy thereof, attested, under seal, by the clerk of the court where it was obtained, who shall certify, that there is no entry or proceeding of the court, to show that said judgment or decree has been satisfied:”—also, “a certificate of some person authorised to administer an oath, endorsed on or annexed to a statement of the debt due on such judgment or decree, that the creditor, since the death of the deceased, has taken before him the following oath, viz:—“That he (or she) hath not received any part of the sum for which the judgment or decree was passed—except such part, if any, as is credited.” And an assignee of such judgment shall also produce the assignment, under the hand of the assignor;—and if there has been more than one assignment, each assignment shall be produced under the hand of the party.

2d. If a special bail shall have discharged a judgment against the deceased, he shall be considered as the judgment creditor; and in case the plaintiff who obtained the judgment shall not have assigned the same (as he ought to do,) to the bail, a receipt from him, given to the bail, shall be considered as equivalent to an assignment.

3d. If there be more than one creditor, the whole oath aforesaid, with the other vouchers shall be sufficient.

SPECIALTY, BOND, NOTE, OR BILL.

II.—1st. In case of a specialty, bond, note, or bill of exchange protested, the vouchers shall be the instrument of writing itself, or a proved copy in case it be lost, with a certificate of the oath or affirmation, made as aforesaid, since the death, and endorsed on or annexed to the instrument, or a statement of the claim, “that no part of the money intended to be secured by such instrument hath been received, or any security or satisfaction given for the same, except what, if any, is credited:”—and if the creditor on such instrument be an assignee, there shall be the same oath or affirmation of the *original* creditor with respect to the time of the assignment; and in case of *successive* assignees, there shall be the same oath or affirmation taken by each, with respect to the time of each respective assignment.”

2d. “In case of a bill of exchange in addition to the foregoing requisites,” the protest and other things which would be required if the deceased were alive, shall be necessary to justify the executor or administrator in making payment or distribution.

RENT.

III. If the claim be for rent, there shall be produced the lease itself, or the deposition of a credible witness or witnesses, or an acknowledgment in writing of the deceased establishing the contract, and the time which has elapsed during which rent was chargeable, and a statement of the sum due for such rent, with an oath or affirmation of the creditor thereon endorsed, “that no part of the sum due for said rent, or any security or satisfaction for the same hath been received, except what, if any, is credited.” And if the creditor be an assignee, there shall be such oath or affirmation of the *original* creditor, with respect to the time of the assignment.”

OPEN ACCOUNT.

IV. The vouchers and proof of any claim or open account shall be a certificate of the oath or affirmation of the creditor as aforesaid, since the death, endorsed on or annexed to the account, “that the account as stated is just and true, and that he or she hath not received any part of the money stated to be due, or any security or satisfaction for the same, except what, if any, is credited;” and

moreover, such account shall not be paid until the same be examined and allowed by the Orphan's court."*

§ 2. It is the *duty* of every executor and administrator whenever a demand against the decedent's estate is presented, to make due enquiry if it is just. He may pay any demand on satisfactory proof that it is justly due, without suit; but if there is no other evidence, (as a judgment, bond. &c.) he should require the oath or affidavit of a disinterested person, whom he should interrogate as to the circumstances, and the witnesses' means of knowing them. And if no ground of suspicion appear, the demand may be paid on that evidence;—but the executor may resist until judgment is recovered against him, and he ought to resist, if he suspects the fairness of the demand.---5 Dana, 39. If he litigates in good faith, he will be reimbursed out of the estate for his costs and expenses.---1 Hill's (S. Car.) Ch. R. 411—So, of counsel's fees. 2 M'Cord's Ch. R. 36; 2 Hill's Ch. R. 377.

Judgment on a claim against an administrator in his representative capacity, is a sufficient authentication of such claim within the meaning of the 90th section of the Orphan's court law. (See Poindexter's Code, 1822)—3 How. 216.

The 90th section of the Orphan's court law, regulating the authentication of claims against the estate of deceased persons, was only designed to protect the administrator or executor against the consequences of wrongful payments, which he may choose to make voluntarily; for if he discharges the debt without the voucher required by law, he does it at his own risk. 3 How. 301.

Nor does the law require an authentication of a claim against the estate of a deceased person as a prerequisite to presentment, in order to prevent the statute from attaching as a bar. 4 How. 242.

§ 3. Since the act abolishing imprisonment for debt, there can properly speaking be no bail bond such as is mentioned in 2d article of the first division of this chapter, (see p. 306)—but it

*It will be observed that only an open account is required to be *both* sworn to and allowed by the Court. Those, not open, may be paid, if *either* sworn to, or allowed by the Court. But the practice of the Court, and it is a safe one, is to require the oath in both cases.

might admit of a question whether the mode of authentication there provided, would not apply equally to securities on an attachment or replevin bond. Query?

CHAPTER XLV.

ADMINISTRATION----PRESENTATION OF CLAIMS.

§ 1. Although it is not necessary to authenticate claims against the estate of a decedent in the manner prescribed in the foregoing chapter, (except to justify the administrator in paying them, if he will,) yet our statute requires them to be *presented* within a limited period, in order that the administrator may know for what amount his intestate's estate is liable, and may be enabled to make provision to pay them as the law directs. It is provided, that "all claims against the estate of deceased persons shall be presented to the executor, administrator, or collector, within eighteen months, after the publication of notice for that purpose, by such executor, administrator or collector, and not after; and all claims not presented within the time aforesaid, shall be forever barred, and the estate of the testator or intestate shall be thereafter discharged from the payment of such claim or claims, and the executor, administrator or collector, may give this act in evidence, without pleading the same specially, in bar of any suit or action, either in law or equity, brought to recover the amount of any claim or claims, of which notice had not been given, by the creditor or creditors, according to the foregoing provisions—*Provided*, that the above limitation shall not be construed to extend to legatees or distributees, claiming as such; and in case the creditor or creditors shall reside without the limits of this State, and have no agent or attorney resident within the same, a further term of eighteen months shall be allowed such creditor or creditors to

present his, her or their claim or claims, to the executor, administrator or collector of the testator or intestate. How. & H. 413.

And "it shall be the duty of executors, administrators and collectors, within two months after granting letters testamentary or of administration, to publish in some newspaper printed in this State, a *notice* requiring all persons having claims against the estate of their testator or intestate, to exhibit the same within the time limited by law, or the same will be barred—which notice shall state the time of granting such letters testamentary or of administration, and shall *continue* to be published *once a week* for *six* weeks, or for a longer time as the court shall direct. How. & H. 414—Acts 1821.

§ 2. Any legal evidence that would establish the *fact* of the *knowledge* of an executor or administrator, (before the limited period has expired,) to the *satisfaction of a jury*, that a *claim exists* against his testator or intestate, will be a sufficient presentation under the statute to such executor or administrator. 2 Sm. & M. 403.

Notice by mail of the dishonor of a note made by a deceased person, which fell due after his death, if received by his executor within the proper time, is a sufficient presentation of the note to the executor to prevent the statute of limitations from barring it. *Ibid.*

And even a motion in the Circuit court, in time, against an administrator, for money paid as surety of his intestate, and an appearance and resistance of the motion by the administrator, is a sufficient presentation of the claim within the statute. 3 How. 216.

Notes secured by mortgage are not necessarily to be presented. The statute does not apply to them. Sm. & M. 687.

§ 3. The period of limitation does not commence running, till the whole time of publication of the grant of letters is completed. 2 Sm. & M. 403. And the limitation does not attach at all, unless publication is made according to the directions of the law.—2 Sm. & M. 452.

And the nine months during which an administrator is protected from being sued, will not be computed within the period of limitation. See title "Limitation."

§ 4. In a public notice of the granting of letters of administration, an error of two days as to the time when granted, is immaterial. 3 Stew. 288.

Legal publication consists of the number of insertions ordered by the court. Any number less than the required number of insertions, at the periods assigned by law, falls as short of the meaning of "publication" in the statute, as it would of giving a proportionate degree of publicity in point of fact. The term of publication in the statute must be fully completed and ended, before the obvious intent of the law is answered; and it is a prerequisite to the commencement of the limitation of claims against an estate.

CHAPTER XLVI.

ADMINISTRATION----INSOLVENCY OF ESTATE.

§ 1. When the estate both real and personal of any person deceased, shall be insolvent, or insufficient to pay all just debts which the deceased owed, the said estate both real and personal, shall be distributed to and among all the creditors in proportion to the sums to them respectively due and owing, saving that debts due for the last sickness and necessary funeral expenses of the deceased, shall be first paid. And the executor or administrator shall exhibit to the Probate court, (before any debts paid to any creditor, except as aforesaid,) an account and statement as is directed in the 98th sect. of this act, (see sec. 4, p. 286, *ante*.) including also the lands, tenements and hereditaments of the testator or intestate. And if it appear to the said Probate court, that such

estate is insolvent, then after ordering the lands, tenements and hereditaments of the testator or intestate, to be sold as aforesaid, they shall appoint two or more fit persons to be commissioners, with full power to receive and examine all claims of such estate; and the said commissioners shall appoint the times and places of their meeting to attend the creditors, for receiving and examining their claims, to be made known by causing notices to be posted up in such public places, and published in such newspaper or newspapers as the said Probate court shall direct; and *six* months, and such further time, (as the circumstances of the case may require,) not exceeding eighteen months, shall be allowed by the said court to the creditors for bringing in and proving their claims before the said commissioners; at the end of which limited time, the said commissioners shall make their report, and present on oath a list of all the claims that shall have been laid before them, with the sums they shall allow on each respective claim, to the Probate court;—and the said court shall order just recompense to the said commissioners out of the estate of the deceased. And the debts due for the last sickness and necessary funeral expenses being first deducted, the said court shall order the residue and remainder of the estate, both real and personal, (the real estate being sold according to law,) to be paid and distributed by the executor or administrator, to and among the creditors, who shall have made out their claims with the commissioners as aforesaid, in proportion to the sums unto them respectively due and owing. *Provided*, that notwithstanding the report of any commissioner, the creditor, whose claim is wholly or in part rejected, or any executor or administrator who may be dissatisfied with such report, on a particular claim, may for good and sufficient cause shown by the said creditor, executor or administrator, to the said Probate court, have the said claims referred by the said court to referees, whose report and award thereon, returned to the next term of the said court and approved of, shall be final and conclusive. And to the end that the executor or administrator may have an opportunity to ascertain the situation of the estate of the testator or intestate, no suit or action shall be commenced or sustained till after the expiration of (by act of 1821, *six* months, but now by act of 1826) *nine* months from the time of proving the will of the

testator, or of granting letters of administration on the estate of the deceased. Nor shall any action or suit be commenced or sustained against him after the estate of the testator or intestate be represented insolvent; excepting however, in all cases, actions for the debts due for the last sickness and funeral expenses of the deceased—excepting also, that if the executor or administrator have objections to the claim on which any action, other than those last mentioned may be brought, shall consent to have such claim settled by action at law, in such case the judgment of the court shall determine the claim and be reported by the commissioners as such. Every executor or administrator, after final apportionment of such distribution among the creditors of the testator or intestate, as aforesaid, shall be liable to the creditors for their respective shares in such distribution. And if any creditor shall not make out his claim with the commissioners within the time of their commission, or before referees, or at common law in the manner this act prescribes, he shall be forever barred of his debt or demand, unless such creditor shall find other estate of the deceased not inventoried or accounted for by the executor or administrator before distribution. How. & H. 410—Act 1821.

In case any suit shall be pending against an executor or administrator at the time he, she or they shall represent the estate of the testator or intestate insolvent, such suit shall not abate or be dismissed, in consequence of such insolvency, but the plaintiff proceed to trial and judgment. No execution shall issue on such judgment against any such insolvent estate, but shall and may be filed, as a claim against the estate of such testator or intestate, any thing contained in the 103d section of the act to which this is an amendment, to the contrary notwithstanding. How. & H. 415—Act, 1822.

§ 2. Any creditor whose debt is not due, may exhibit it to the executor, administrator or collector, as if it were due—and thereupon shall be considered as a creditor under this act, and shall receive a dividend of the estate of said testator or intestate, deducting a rebate of legal interest, for what he shall receive on such debt, to be computed from the actual payment thereof, to the time such debt would have become due. How. & H. 410.

§ 3. The commissioners appointed to receive and examine the claims of the creditors of the estate of any person deceased, when reported insolvent, are hereby authorised and empowered, when judged expedient by a majority of them, to examine on oath or affirmation any creditor, touching the truth of his or her claims; and may, thereupon, inquire of such creditor, the truth of any writing, demand, or the charges in any account exhibited, as a claim against such insolvent estate, and whether the same and every part thereof remains actually due and unpaid, and may make such other questions relative thereto, as shall be material and tending to discover the truth of such claim;—and the said commissioners, or either of them, are hereby authorised and empowered to administer such oath or affirmation. And if any person who shall have taken such oath or affirmation, (the same having been duly administered as aforesaid,) shall thereupon wilfully and corruptly make any false answer or answers to any question or questions, material to the determination of the truth of the claim in proof of which such oath or affirmation shall have been taken, and shall be thereof duly convicted, he or she so offending, shall be adjudged guilty of wilful and corrupt perjury, and liable to the pains and penalties thereof. How. & H. 411—Acts 1821.

§ 4. If the commissioners appointed by the Probate court of any county, to receive and examine claims against the estate of any deceased person, which has been by the Probate court declared insolvent, shall fail to make their final report within the time limited by law, it shall be the duty of such Probate court to make new appointments, or extend the time for the said commissioners to receive claims against such estate, and report thereon, to such time as shall to said court seem reasonable and just, any thing in this act to the contrary notwithstanding. *Ibid.*

§ 5. In addition to the powers granted in the one hundred and seventh section of the act to which this is an amendment, the Probate court shall have power to compel commissioners to report, agreeably to the order of court, by citation or attachment, as the case may require; and shall allow said commissioners three dollars per day, to be paid out of the insolvent's estate. How. & H. 421—Act 1839.

When Estate may be reported Insolvent.

§ 6. The estate of a decedent may be declared insolvent when from a comparison of the debts exhibited to the administrator against the estate, and an estimate of the probable value of the whole estate, both real and personal, it appears that the amount of debts is greater than the probable value of the property.—2 Sm. & M. 287. And it is not necessary in order to ascertain this, and declare an estate insolvent, that an order should have been *previously* obtained directing a sale of the realty of the deceased. *Ibid.*

An estate may be represented and declared insolvent after the expiration of the nine months from the grant of letters testamentary or of administration; and it seems, at any time before the expiration of the period limited for the presentation of claims—6 How. 352—that is, within eighteen months as to resident, and thirty-six months as to non-resident creditors, having no agent here. See sec. 1, p. 309 *ante*.

The Probate court has a discretion in declaring an estate insolvent, which, when exercised, is conclusive, unless a direct appeal is taken; but a judgment cannot be collaterally impeached. 6 How. 452.

An administrator ought to represent an estate insolvent, only when he believes it to be so. Nor ought the Judge of Probate to allow such a representation and award the commission of insolvency, unless he also, on examination, has reason to believe the fact.—17 Mass. 380, 386. But a commission may be awarded on an *apparent* insolvency, and the judge may, on the return of the commission and the settlement of accounts, either decree a distribution of the effects as of an insolvent estate, or not; and if he does, such decree becomes legal evidence of an absolute insolvency. 4 Mass. R. 448.

And where the Judge of Probate rejects a representation of insolvency, and on a second application of the administrator, he offers to support his representation by legal evidence, the Judge should receive the evidence and decree thereon without reference to his first decree. For since the first decree, new evidence of the insufficiency of the estate to pay debts may have been discovered

by the applicant, or credits and effects counted on as assets, may have become worthless. 6 Mass. R. 448.

Notice by Commissioners.

§ 7. The court of Probate has full discretion under the statute, to direct the mode of notice to creditors of the time and place of their meeting to receive and audit claims—and where the court directs a publication in a newspaper only, and the order of the court is followed, it will be sufficient, though no notices be published in public places. 2 Sm. & M. 287.

Time of Commissioners' Report.

§ 8. Commissioners of insolvency may report at any time (after the period of their appointment has expired,) within eighteen months from the date of their appointment, and their report if received and allowed by the Probate court, will be valid—where it appears that the court subsequently to the expiration of the time of their appointment, extended the time, at a term subsequent to that at which the commissioners were ordered to report. 2 Sm. & M. 287.

The Judge of Probate (under the Massachusetts statute,) can re-open a commission, *before* distribution, and within the time limited by the statute. 16 Pick. 255—See also 6 Pick. 458.

It is no part of the official duty of an administrator to receive the report of commissioners, and to carry or send it to the Judge of Probate;—and if he do receive such report, and undertake to return it, this is merely a personal engagement, for the performance of which the sureties in his bond are not liable.—1 Greenl. 251. It is the duty of the commissioners of an insolvent estate to make their own return to the Judge of Probates. *Ibid.*

Exceptions to the Report.

§ 9. The report of commissioners of an insolvent estate for the allowance and settlement of claims, must be excepted to at the term of the Probate court to which it is returned.—6 How. 524. At any term of the Probate court after the report of the commissioners appointed to audit, &c. has been received and *approved*, it is too late to open it. 2 Sm. & M. 520; 1 Sm. & M. 321—But see 16 Pick. 255, and 6 Pick. 458, and compare them with the foregoing.

Nor can the Probate court, at a term subsequent to that at which the report of the commissioners of insolvency is received and confirmed, set it aside, unless for some reason, the previous order had been null and void. The provision of the statute in regard to the appointment of referees for the allowance of claims against insolvent estates, is, so far as it relates to creditors, subsidiary to the appointment of commissioners, and is only exercised when a claim has been submitted to commissioners, and by them, in whole or in part, rejected.*

Effect of representing Estate insolvent.

§ 10. When an estate is represented insolvent, the course of the common law in regard to the claims of creditors is stopped, and they cannot afterwards sue their claims, even though the estate should ultimately prove solvent; but the course pointed out by the statute must be pursued. 15 Mass. 264; 6 Pick. 330; Minor, 254.

But if suit has already been brought, the plaintiff shall be entitled to judgment, but not execution. See ante sec. 1, p. 313, citing How. & H. 415.

If an *apparent* insolvency happens pending a suit, the creditor is not obliged to proceed to judgment, nor need he discontinue his suit, as the estate may not prove eventually insolvent, or the *apparent* insolvency may be defeated by the negligence of the executor or administrator, in which cases the plaintiff may have judgment and execution, (or his claim before the commissioners may be disallowed,†) in which case he is entitled to proceed to judgment.—4 Mass. 620, 625. But if *during apparent* insolvency, and *before* an *absolute* one, a creditor sues without first submitting his claim to the commissioners, the executor or

*Where commissioners of insolvency allow part of a claim and reject part, and the creditor does not give notice of his dissatisfaction with the report, and the executor brings an action against the creditor on a demand in favor of the estate, which was not laid before the commissioners of insolvency, the creditor is not precluded from filing, in set-off, that part of his claim which was rejected by the commissioners. 9 Pick. 37; 2 Mass. 498; 1 Tyler, 198.

†An action at law, by statute of Mississippi, on objection of the executors or administrators, is only allowed with *their consent*—where disallowed by the commissioners, the only appeal is to a Board of Referees. See sec. 1, ante.

administrator may abate the writ by admitting the demand and pleading the insolvency.—*Ibid.* But where the executor or administrator disputes the demand, the plaintiff may proceed to judgment, as conclusive evidence of his claim to be laid before the commissioners, but he cannot have execution.—*Ibid.* (This rule is inapplicable under our statute, as no suit can be brought against an executor or administrator *here*, after a representation of the insolvency of an estate—which amounts to *apparent* insolvency.)

Where a defendant dies pending the suit, and the administrator comes in to defend, the judgment issuing, if any, against the estate of the deceased, is to be laid before the commissioners of insolvency, and by them to be received as conclusive evidence of the debt, and the amount is to be placed on the list of claims to be reported.—7 Pick. 239, And the whole amount of the judgment, including the cost as well as the debt, is to be certified to the Judge of Probate and added to the list. 11 Pick. 389.

If there appear to be an absolute insolvency, the executor or administrator may plead a special *plene administravit*—and if the creditor admits the truth of the plea, or it be proved, no judgment can be rendered for either party. 4 ib. 620, 625.

And where judgment was recovered against an administrator, and afterwards he discovered the estate to be insolvent, and so represented it to the Probate court, which appointed commissioners, &c.—and afterwards plaintiff issued execution, which was returned “*nulla bona*,” and he thereupon sued out a *scire facias*, suggesting waste—*held*, the defendant might plead the proceedings in the Probate court representing insolvency, &c. as a defence in bar of the action. 5 Greenl. 45.

Where a judgment is obtained against the administrator of a decedent after a representation of insolvency, an execution thereon will be enjoined in Chancery—1 Sm. & M. Ch. R. 599—or the court from which the execution issues may stay the process. 6 How. 352.

But the *lien* of a creditor who has obtained judgment and sued out execution thereon, before the death of the decedent, is not cut out by a report or representation of insolvency. 7 How. 226.

“By our statute a judgment becomes a lien from the time of its rendition, on all of the defendant's property.* By statute, also, the property of a deceased person becomes liable for his debts, from the time of his death. The law declares that when an intestate shall be insolvent, the assets shall be distributed amongst all the creditors in proportion to their respective claims. There is also a provision that no suit shall be commenced or prosecuted after an estate is reported insolvent; and a further provision that, if a suit be pending, when such report is made, it shall not abate, but may be prosecuted to judgment—but no execution shall issue, &c. But a judgment recovered against an administrator, when the estate is insolvent, bears no analogy to a judgment recovered against the intestate. In the latter case, the judgment was a subsisting lien before the death of the deceased debtor, and the former being only a general liability, cannot defeat a fixed lien having a previous existence.”

“The provision which declares that when the estate is insolvent, the assets shall be distributed in proportion to the debts, can only mean such assets as the administrator can control.”

In case of judgments against a decedent, obtained in his lifetime, “the assets come to the hands of the administrator incumbered, and that incumbrance must be removed before general creditors can be let in.” 7 How. 226.

If the defendant die after judgment, and before the issuance of an execution, the judgment must be revived by *scire facias*, before an execution can issue. 3 Sm. & M. 1.

If one execution issue and be returned without a levy, and defendant dies before issuing a second, a revival is necessary.—*Ib.* 2 How. 604; Walker's Rep. 155; *ib.* 66; *ib.* 174.

But a *sale* under an execution against an administrator *without revival* of judgment, is good.—5 How. 153. *Scire facias* against an administrator to revive a suit, is not in the character of an ac-

*But now by the statute of 1844, it is provided that “all liens against any purchaser or purchasers, of any property purchased at a sale of any decedent's estate, now given by law, shall cease and determine as to creditors of such purchaser or purchasers, or to the vendee of said purchaser or purchasers, unless such lien is enforced within two years after the maturity of the debt, to secure the payment of which such lien is given. Act of 1844—sec. 13, ch. 8, p. 101.

tion, and may be maintained previous to the expiration of the nine months. 1 How. 273.

Remedy of Creditor not exhibiting his claim.

§ 11. The discovery by a creditor, of an insolvent estate of property not inventoried or accounted for, does not entitle him to an action against the administrator or executor, after four years, (in Mississippi, eighteen months,) the time limited by law of Massachusetts for suing executors and administrators; and whether it entitles him in any case seems doubtful. It certainly does not if he has filed his claim with the commissioners. (See sec. 1, *ante.*)—15 Mass. 148; ib. 491; ib. 140. If property not inventoried or accounted for by an executor or administrator, be discovered by a creditor to an insolvent estate, the executor or administrator on being apprised of the fact, should administer the same; and if he refuse, the remedy of the creditor is by representing the fact to the Judge of Probate, who has authority to remove such administrator, and appoint another, whose interest as well as duty would be to do justice in this respect. *Ibid.*

If the administratrix of an estate represented insolvent, when requested by creditors to inventory real estate, alleged to have been fraudulently conveyed by the intestate, they offering to indemnify her, refuses to do so, it will be sufficient ground for her removal. 7 Pick. 250.

The recovery by the heirs of one deceased of a judgment for land to which the deceased had lost his right of entry, cannot be regarded as the discovery of estate not inventoried or accounted for, within the meaning of the Massachusetts statute---15 Mass. 140---nor the recovery of estate of which the deceased was colorably or fraudulently disseized during his life-time. Ib. 148.

And, it seems, where a creditor of an insolvent estate, which has been closed, neglected to exhibit his claim within the time allowed, if he afterwards discover and show to the administrator, other estate not before inventoried, he may sustain an action against such administrator for the recovery of his claim---1 Connt. 13---and he may sue on his bond. Kirby, 39.

A court of Probates may compel the administrator on petition of a stranger, to inventory assets of a decedent---7 How. 316. So, one *administrator ad colligendum* may compel his co-administra-

tor to do so—and if the defendant claims such assets as his own, he may have the benefit of an issue to try that question. 6 Sm. & M.—*Compton vs. Compton et al.*

Re-opening Commission.

§ 12. It has already been shown that after the report of commissioners of insolvency has been allowed, it will not for any cause be opened by the same court, at a subsequent term—see *ante*, sec. 9, p. 317—unless the former orders were absolutely null and void. 5 Sm. & M. 354; 3 ib. 329.

But, it seems, that where a claim against an estate represented insolvent was allowed by the commissioners *in full*—although they had notice of its being partly secured by a mortgage, and that the *balance* only was claimed, and they made their report, it was held the Judge of Probate might re-open the commission, for the correction of the mistake. 16 Pick. 255.

And where R. alleging himself to be a creditor of M.'s estate, laid his claims before the commissioners of insolvency of that estate, who rejected them; R. had his claims referred to referees, who reported against them and the court rejected them. At a subsequent term it was agreed, by the attorneys of both parties, that the claims should be again referred for another report, and depositions taken on both sides. Neither party objected to second reference in the court below—*Held*, such acquiescence precluded all objection to the second reference. 5 Sm. & Marshall, 394.

Where a report is sent back by this court (High Court of Err. and App.) for re-examination on the facts, by referees of claims against an insolvent estate, referees can form their own estimate of the testimony. 5 Sm. & M. 395.

H. filed his petition in the Probate court, alleging the death of R. in 1839—report of insolvency in 1840—and appointment of commissioners, who reported in July, 1841—petition of H. was filed in 1843—when petitioner became creditor of R.'s estate by paying a note as surety of R.—the estate being then undistributed. H. prayed that the commission be re-opened—*held*, that H.'s duty was to have paid the note as surety, at an earlier date, or have caused the holder to present it. Petition refused. 5 Sm. & M. 354.

In a conflict of testimony before referees respecting a claim against an insolvent estate, where payment was alleged, and there were various and independent dealings between claimant and deceased, which rendered a decision difficult—*held*, the case was peculiarly proper for an issue before a jury. *Ibid.* 394.

Proceedings before Commissioners.

§ 13. Commissioners of insolvency on the estate of a person deceased, are not authorised to allow a claim against the deceased which depends on a contingency, whether it will ever become due. 11 Pick. 478—and see 5 Sm. & M. 354, cited in preceding section.*

By the statute of Massachusetts of 1805, actions against sheriffs for their own official wrong and that of their deputies, survive against their executors and administrators—but representing the estate insolvent operates as a bar to this action as well as others, and one entitled thereto must present his claim before the commissioners. 17 Mass. 567,

A surviving dormant partner, who has a claim against the firm, may lay it before the commissioners on the estate of a deceased active partner—and they may allow it on condition that the payment of it be postponed till all the claims against the partnership are paid in full. 11 Pick. 173.

For provisions for widow out of her husband's insolvent estate, see How. & H. p. 421.

Where a defendant dies pending the suit, the judgment when obtained is to be laid before the commissioners of insolvency, and by them received as conclusive evidence of the debt.—7 Pick. 239. The whole, including debt and cost, must be certified to the Judge of Probate and added to the list. 11 Pick. 389.

Where mutual demands for and against a creditor of an insolvent estate are filed before the commissioners of insolvency, and they report a balance to be due to the creditor—the report is con-

*Under the New-Hampshire statute of July 2d, 1822, in relation to the settlement of insolvent estates, there is no remedy against the executor or administrator, even if the estate turns out, not, in fact, insolvent—and the claim against the estate depended on a contingency, which did not happen, till the estate was settled. 5 N. H. 82.

clusive on either party who does not give notice of his dissatisfaction, pursuant to the statute of 1784,---4 Pick. 212.

But in an action by an administrator to recover a debt due to his intestate, the defendant may offset a claim, which he held against the intestate at the time of his death, though the estate had been declared insolvent.---3 Stew. 151. But see *post.* title "Set-off," for the rule on this subject in Mississippi.

§ 14. It is not necessary that it appear of record that the report of the commissioners of insolvency was made under oath, or that the advertisement of the meeting was made; these are matters of evidence, and if not affirmatively stated of record that they were *not* done, the legal presumption is, that the law and order of the court have been complied with, and the proper steps taken.—5 Sm. & M. 354.

CHAPTER XLVII.

ADMINISTRATION---PAYMENT OF DEBTS.

§ 1. In paying debts, the following order must be observed, under the rules of the Common law:—

- 1st. Debts of record:*
- 2d. Specialties:
- 3d Simple contract debts.

But the rule is not absolute.

Priority of Claims.

§ 2. For specialty debts, he is bound from the time of notice; and of the existence of debts of record in the county of decedent's death, or where he had recently resided, he is presumed to have had notice. 3 B. Monroe, 291.

*Funeral expenses necessarily incurred, are preferred to all others—and physician's fees not exceeding \$25.

An administrator is not bound to take notice of a suit in a county different from that in which the testator dies,—and the executor has qualified in—so as to be liable if he disburse the estate. 5 B. Monroe, 190.

Executors and administrators are bound to take notice of debts due by their testator or intestate, as administrator or guardian, where they qualified in that county, in that character, in the same county of the executor or administrator. 3 *Ib.* 292.

An administrator must be presumed to have notice of a note secured by mortgage. 2 Sm. 687.

Where there are two judgments, one absolute, the other *quando acciderint*, and afterwards come into the hands of the administrator, they must be applied to payment of the first judgment.—1 Hayw. 460.

§ 3. Notice of a bond before letters of administration, is sufficient to prevent the payment of a simple contract debt. Notice need not be by suit.—2 Hayw. 334. An *ex parte* proof of a debt before a magistrate, is of no avail.—*Ib.* (But in Mississippi, such *ex parte* proof, endorsed on the specialty, will *justify* the administrator in paying it, if he will. See *ante*, sec. 1, p. 307.)

An administrator is not justifiable in paying a simple contract debt, after notice of a debt by specialty, although such notice was not by institution of a suit. 3 Har. & M'Hen. 131.

§ 4. An executor, who has been sued by one specialty creditor cannot pay another, who has not sued, in preference to the former. Such payment is a *devastavit*—but he may *confess judgment* in favor of the latter, and legally satisfy the judgment, so confessed.—9 Dana, 343—See also 1 Hayw. 460. A judgment absolute, must be paid before a judgment *quando acciderint*.—*Ib.*

An administrator must pay debts due before debts not due.—1 Hayw. 411—But see 1 Bailey, 111.

He cannot pay legacies before debts—If he does, he is liable to creditors, tho' discharged by the Probate court.—5 Rawle, 266.*

*Where an administrator is ordered, by a decree of distribution, to pay money into the treasury of the commonwealth, it is his duty to make payment without any demand on him. 24 Pick. 315.

Debts to the Bank of the Commonwealth in Kentucky, are debts of superior

An executor or administrator may properly apply funds of the estate to remove incumbrances created by the testator, in his lifetime, on lands *specifically devised* to him, but may not purchase incumbrances to his own use. 2 B. Monroe, 87—See 1 Paige, 270.

But an administrator of an insolvent estate has no right to apply assets to extinguish an incumbrance on the real estate, for the benefit of the widow and heirs. 5 Pick. 146.

§ 5. An administrator can only apply the assets in his hands to the discharge of the debts and legal obligations of the estate. He may not pay demands for which the intestate was not liable, or appropriate the assets to the widow, heirs, or any other person, however nearly connected with or dependant on the estate, without a decree of the court of Probates. 10 Pick. 429; *ib.* 371.

An executor is not liable for a contract of his testator made during infancy, (it not appearing to be for necessities, or to have been confirmed by the testator after coming of age,) although the testator directed the payment of all his just debts.

§ 6. According to the modern decisions, (though anciently it was otherwise,) an executor who has paid a debt of his testator, may retain the amount; at least for a simple contract debt—but not if he has merely assumed the debt. He cannot gain an advantage over the *specialty* creditor, to whom he was bound as surety of the testator, any more than he can by purchasing any other of his testator's debts. But as he cannot confess judgment in favor of himself, he would seem entitled to preference over a *bond* creditor, who has not sued.

An executor who makes a purchase, at the sale of his testator's effects, cannot apply the amount to a claim of his own against the estate, in preference to claims of superior dignity.—7 Dana, 451. For an administrator cannot discharge his own debt in preference to others of superior dignity, but he may in regard to those of equal dignity. In some of the States where no difference is made in payment of debts, this rule does not apply. 5 Peters, 304. See "Marshalling Assets."

dignity by statute of incorporation, and this rule is applicable to a replevin bond given before act passed. 7 Dana, 265.

A debt due a citizen by specialty, is to be preferred to a simple contract with the commonwealth. 1 Ribb, 529.

If executors have paid notes to a Bank, or the Banks have accepted the notes of the executors in payment of their testator's notes, so that the executors became the debtors and personally responsible to the Banks—the only effect of this is, that the executors became the creditors of the estate in place of the Banks, and may resort to the trust fund to satisfy the debt. 10 Pet. 532.

Subject to the foregoing rules, if an executor or administrator pay debts of the estate with his funds, to the value of the assets in his hands, he may apply such assets to his own use, towards satisfaction of the funds expended for the benefit of the estate.—8 Pick. 29; 2 M'Cord's Ch. 77.

CHAPTER XLVIII.

EXECUTOR'S AND ADMINISTRATOR'S ACCOUNT.

§ 1. It is the duty of every executor to render an account current of their administration to the court of Probate. The clerk is required to report every administrator who is a delinquent, whereupon it is the duty of the court to cite them to appear and show cause, &c. How. & H. p. 406, 407, sec. 73, 74.

“It is also the *interest* of administrators and executors to pass one or more account within the period required by law. Without it, they cannot form a true judgment of what is left in their hands for administration;—or if they only keep an account themselves, they are liable to mislay, or lose, or may by various accidents become dispossessed of the vouchers, which alone can entitle them to an allowance for disbursements. See “Commissioner's Guide, by Elie Valette.” An executor should make his *annual* account to prevent it from becoming complicated. 2 M'Cord's Ch. R. 8.

Upon the death of an administrator, without having settled his account, it belongs to his representative, and not to the administrator *de bonis non*, to present such account to the Judge of Probate for allowance and settlement. 2 Green. 75.

What remains due on such account to the estate, is chargeable in the account of the next year, and so on from one account to another till a final account. Com. Guide.

If the highest evidence cannot be exhibited, the next must, and the Ordinary may allow the executor or administrator time to produce his vouchers, as evidence of payment. 2 M'Cord's Ch. R. 8.

In stating his account, the executor or administrator must identify and refer to the voucher on which he intends to rely in support of each item or charge.

For such debts as were due from the deceased at the time of his death, and paid by them without suit, they must exhibit vouchers in the form required by the statute as herein before set forth, (see pages 306-7) with the receipt of the creditor annexed to or endorsed thereon. But as the statute was intended only to protect them from the risk of paying debts without such vouchers, he may, if he pay a debt not proved or allowed in the mode which the statute prescribes, justify himself by proving or showing the justice of the debt or claim *aliunde*, to the satisfaction of the court.

If an executor, in good faith, pay a claim not authenticated according to the statute, the payment is not at his risk, and his right to a credit for it is unquestionable. 3 Gill. & John. 39—See act 1846.

Evidence of payment.

§ 2. Administrators should be allowed the amount of all judgments against them. 1 Har. & John. 234.

Receipts given by creditors are evidence to the amount specified as between the parties to it, and also *prima facie* against creditors and distributees, subject to be rebutted by other evidence or by the admission of the executor, who may be required under oath to state the sum actually paid; and the amount of the receipt must be admitted, unless it be proved that the administrator had a less sum. 5 Dana, 40.

An acceptance of the intestate, endorsed by the drawer with a receipt to the administrator, at a date when the intestate was liv-

ing, is not such evidence as will entitle the administrator to the credit. 5 Dana, 480.*

For money paid to appraisers, a receipt only is required. Commissioner's Guide, 131.

For an account of taxes paid, the receipt of the collector is the voucher, and must be produced. 1 Mass. 101.

Order of payment.

§ 3. For such claims as have originated since the death of the deceased, a statement of the items and the receipt of the creditor will usually be sufficient, and these must be exhibited in the following order:

I. Funeral expenses—which embrace only what is sufficient to pay for coffin and sexton's fees.

The allowance for this purpose will be proportioned to the rank and fortune of the deceased, so that the claims of creditors and convenience of the family of the deceased do not suffer by it.—Commissioner's Guide, 39. For small estates, such charges only should be allowed, as will defray the cost of the coffin and interment of the deceased, without pomp or ostentation. *Ibid.*

But if the deceased in his will has directed an expensive funeral, and the claims of creditors will not be affected thereby, the direction ought to be pursued, and it will be allowed as being in the light of a legacy paid by the executor. *Ibid.*—& see 1 Har. & John. 234.

The estate of a testator is not liable for his widow's funeral expenses. 3 Rawle, 300.

II. Last sickness and physician's bill.†—See 10 Pick. 77.—Where expense of bringing the relations of the decedent, sent for by his wife, to come and see him in his last sickness at a distance from home, was allowed. As to what is meant by last sickness, see 8 Greenl. 167.

III. For the expense of cultivating the growing crop, maintaining negroes, &c., under the statute—see *ante*, page 268.

* Administrators are allowed for widow's thirds, whether paid or not.—1 Har. & John. 234.

† Physician's bills only preferred, to the amount of \$25. How. & H. 420—Acts 1833.

An executor or administrator should exhibit a distinct account of each particular sum expended towards finishing the crop while on hand, specifying the quantity of each product, with the length of time the slaves were employed in it, and the real disbursements for maintaining and clothing the servants, (if any there be)—Comm. Guide, 133—and allowance made for finishing the crop. 1 Har. & John. 232. In finishing the growing crop, an executor or administrator is not bound to discharge the duties of an overseer. He may employ and pay out of the funds of the estate as many overseers as are necessary for the completion and preservation of the crop. If with greater advantage to the estate, he acts as overseer himself, it is competent to the Orphan's court to allow him a reasonable compensation for his services—6 Gill. & John. 309—and he may retain a reasonable compensation. 9 Conn. 10; 3 A. K. Marshall, 66.

And executors and administrators may claim an allowance for sums of money necessarily expended by them in clothing and maintaining slaves unable to work and sustain themselves—and a similar allowance as to slaves able enough to work and maintain themselves.—6 Gill. & John. 171. The allowance of a sum in gross, in an administration account, without items or explanations, is incorrect. 4 Day, 137.

IV. Reasonable expenses, and compensation to the administrator, and debts of decedent. See 4 Hen. & M. 57.

V. All legacies paid by them under a will, and distributive shares.

All specific legacies will be allowed, and the appraisement is conclusive of the amount. 1 Har. & John. 234.

What payments allowed.

§ 4. If the administrator pay off the debts of his intestate at a discount, he is entitled to a credit only for the sum paid. 4 J. J. Marsh. 255; 15 John. 65.

M. died, being indebted to a Bank whose notes were greatly depreciated, and his estate was declared insolvent, and commissioners appointed. The Bank had made a general assignment to assignees. If the administrator desires to pay the Bank its distri-

butive share in its own notes, the assignment being illegal, he may except to the report of the commissioners, and have the claim passed on by a board of referees; or he may require a suit at law, and so frame the issue as to reach the point.---4 Sm. & M. 332.—Whether the administrator could attain the same end by permitting himself to be sued as for a *devastavit*, and setting off the debt due to the Bank in its own notes—query? *Ibid.*, citing 6 Cowen, 494.

An administrator should be credited in his account for the expense of keeping a horse, which could not be sold on account of the imperfection of the intestate's title. 7 J. J. Marsh. 190; 11 S. & R. 204.

He may be also credited for a fee paid by him to a lawyer, for defending the title of the administrator as such to property—*Ib.* 6 Halst. 44—or for advice of counsel where needed—2 Penn. R. 419—and costs reasonably incurred in a suit are a proper charge for an administrator against the estate in his hands.---6 Greenl. 48. So, all reasonable charges and disbursements for the benefit of the estate they represent, and a reasonable recompense for their personal trouble, in preference to the claim of any creditor of the estate—4 H. & M. 57—and they may retain out of the assets the amount, against both creditors and distributees. 3 A. K. Marsh. 66.

An administrator will be allowed for taxes paid by him, for which the estate was bound to pay, though after many years it did not clearly appear how he paid the same. 2 Vermont, 294.

But taxes paid by an administrator on lands in a foreign State, where he had not taken out administration, were not allowed in his account.---10 Pick. 77. But where, in good faith, he paid taxes on land, supposed to belong to the testator and purchased by himself, but the testator's title to which proved defective, he was allowed such taxes in his account, upon his conveying all his interest in the lands to the parties interested in the estate, with warranty against incumbrances created by himself.—*Ibid.* He will not be allowed payments made to redeem lands sold on account of his negligence, above the actual amount of taxes due before sale. 4 N. H. 208.

What not allowed.

§ 5. Fees paid and compensation for personal services in the prosecution of suits *in the name of the heirs*, relating to *land*, should not be allowed in the settlement of an executor's account—the prosecution of such suits being no part of his official duty. 2 Bibb, 609.

Nor will he be allowed for expenses incurred in an ineffectual attempt to strengthen the title to real estate of the intestate; nor for money expended by him in the repairs of the real estate, however necessary. With the real estate or its title, he has nothing to do, unless the estate is insolvent. 4 N. H. 208.

But where an execution against an administrator was extended on lands in his occupancy, on which he had made improvements, the value of which was included in the appraisement, the value of such improvements ought to be allowed in his account.—6 Greenleaf, 139.

Where a bill in Equity brought by the administrator and heirs of the intestate, to recover land devised to him, was discontinued, and an execution against them for costs was paid by a stranger, and not by the administrator nor at his request—*Held*, a charge for such costs, in the administrator's account, was properly *disallowed* by the Judge of Probates.

Where an administrator employed an agent to collect money for the estate under his care, no resort being had to legal process, and the agent being neither a public officer nor an attorney—*held*, the compensation of such agent was not a charge upon the estate.—4 ib. 453.

An administrator will not be allowed for money expended by him for ardent spirits used at an auction of the goods of the deceased. 5 N. Hamp. 492.

Expenses incurred in the sale of lands, in the state of Vermont, are not allowable against the estate of the deceased lying in Connecticut. 1 Root, 182.

An administrator cannot charge in his account the expenses of the support and education of the infant heir of the intestate. 8 Mass. 131.

§ 6. The proper time for claiming an allowance for bad or desperate debts, by an administrator, is when the intestate's accounts are settled. 11 S. & R. 204—See "Devastavit."

§ 7. The items on the credit side of an administrator's account, may be expressed in general terms. 6 Halst. 44.

§ 8. There are many considerations that may materially affect the accounts of executors and administrators—which will, owing to their contingent character, fall more properly under distinct heads. The reader is therefore referred to the titles of "Interest," "Commissions," "Devastavit," "Set-off," *post.*—and "Inventory," and "Assets," *ante.*

Administrator's oath and answers.

§ 9. An administrator, though bound to make oath to the truth and correctness of his accounts, and to answer such specific interrogatories as may be put to him touching the same, cannot be admitted, upon his own motion, as a competent witness generally to his accounts and their items—except to support small charges, according to the usage of courts of Probate. 12 Pick. 166.

If an administrator in answer to interrogatories in the Probate court, touching his account, makes an admission tending to charge himself with estate omitted in his account, and at the same time states a fact in his discharge unsupported by proof, such statement is irrelevant, and to be rejected.---8 Pick. 484. And the party at whose instance such interrogatories have been proposed, may offer evidence to disprove the answers of the administrator. *Ibid.*

A Judge of Probate has authority to examine an administrator upon oath, as to any obligation due from such administrator to the estate of his intestate. 7 Pick. 14.

Opening and correcting Annual Accounts.

§ 10. If by mistake or other just and sufficient cause shown, an omission has taken place in a partial account, exhibited by an administrator, in an Orphan's court, such omission may be corrected, and just allowance be made to the administrator in his final account.---6 Halst. 44. Such account may be opened for correction, on petition to the Judge of Probate, or on settlement of a new account. 9 Pick. 27—see also 1 Pick. 157.

Final Settlement.

§ 11. The Judge of Probate, besides the duties enjoined on him in term time, is hereby empowered and required to take, receive, and audit for probate, applications for administration, inventories and appraisements duly made to be recorded, to appoint guardians to minors of their own election, and to cause to be issued all citations and other necessary process returnable to the next term of said court. And the said Judge of Probates after examining and auditing such accounts, and causing them to be properly stated, shall report the same for allowance to the next term of the said Probate court—the executor, administrator, collector, or guardian, giving at least *forty* days notice of his intention of having such account presented to the said court for allowance, at such term, by posting up advertisement thereof, in three of the most public places in the county, or advertising the same for three weeks, at least, in some public newspaper in this State, as the said Judge of Probate shall have directed. And the court, on due proof of notice as aforesaid, and no exception being made to the account as stated, may decree an allowance thereof. But if any person or persons interested in the settlement of said account, shall by himself, or attorney, appear and make exceptions to the same, the court shall either proceed to hear the proofs and allegations, and correct or amend the mistakes and errors in the account as reported, or refer the same to auditors who shall examine and re-state the account, after hearing parties and witnesses, and make report to the next, or some subsequent term of the court, as the said court shall direct, for confirmation and allowance as aforesaid,---Acts 1821, How. & H. 403—amended by act of 1846, as follows, to wit:—

Whenever any executor, administrator, or guardian, by operation of law, or in obedience to the process of any Probate court in this State, shall render a final account of his administration or guardianship, the Probate court having cognizance thereof, shall cause citations to be issued and served on all the legatees, heirs, or distributees of the testator or intestate, or upon the ward, as the case may be, if such heirs, distributees, or wards, reside within the county in which said court sits, citing them to be and appear before said court, on a day certain, not less than forty days

after such citation shall be issued—to show cause why such final account should not be allowed, and a decree made thereupon accordingly;—and whenever such legatees, heirs, distributees, or ward, shall be non-residents of this State, or reside beyond the jurisdiction of the court, so that the process thereof cannot be served on them, the said executor, administrator or guardian, shall make affidavit of the fact, and the said Probate court shall thereupon cause publication to be made in some newspaper in this State, citing said absent legatees, distributees or wards, to appear before said court on a day certain, not less than *sixty* days from and after the *first* insertion of the citation or notice, to show cause why such account should not be allowed, and a decree made thereupon accordingly;—and whenever any of such legatees, heirs, or distributees, or said wards, shall be minors, or insane, such citation, as to them, shall be served on their guardians, and said publication directed to said guardian by name and character. And in case such minor, or insane person, shall have no guardian, the said Probate court shall appoint a guardian or guardians *ad litem*, residing in the jurisdiction of said court, who shall be cited as aforesaid, and may appear in the cause in the same manner as guardians *ad litem* may do in a court of Equity.—Act of 1846, ch. 12, sec. 12, p. 150, (sheet acts.)—See also *ante*, sec. 6, p. 22.

The same act provides that bills of review may be filed before Judge of Probate, for the correction of any interlocutory or final decree of said courts. See page 13, *ante*.

Effect of Decree.

§ 12. Nothing is more clear, than the general rule that *ex parte* settlements of accounts by executors, in the Orphan's court, being within the acknowledged jurisdiction of the court, are *prima facie* correct, and the burden of proof is on those impeaching them.—Suit should be brought *recenti facto*, in a reasonable time, and *at furthest*, within the time prescribed by the statute, for limitation of actions on account, or else some excuse shown for the delay.—13 Peters, 381—see also 2 Bailey, 60.

The decree of the court of Probate, allowing an administration account, cannot be impeached collaterally, in an action on the probate bond. The only remedy for the party aggrieved is by

appeal, writ of error, or application for a new trial.---4 Day, 415. See 1 K. Marshall, 349. The court and not the jury are to judge whether fraud appears on the face of said proceedings.—*Ibid.* See next section 13.

§ 13. It is not competent for a court of Probate to decide, that an account of an executor is final, so as to bar all further enquiry into matters not included in the account.---14 Pick. 345. But in Mississippi, it is decided that—A final account of an executor allowed by the Probate court, cannot be set aside by the petitioner except for fraud. Irregularity or error in the allowance of the account could only be corrected by a writ, or on appeal. 7 How. 188;* 3 Sm. & M. 329. And it can only be excepted to at the same term, when it is reported by commissioners, or confirmed by the court. *Ibid.*

The administrator having acquired the rights of a distributee, will not be allowed to impeach the final settlement, on account of a mistake which was at the time in his favor, and against the estate.. 5 How. 736.

The confirmation of an executor's accounts may be resisted by any person interested in the estate. 1 Dana, 371.

The amount ascertained, on a settlement of administrator's account, as due by him, is no criterion of the value of assets that came to the hands of the administrator *de bonis non*. 7 J.J. Marshall, 188.

*An executor who has rendered and settled a final account in the Probate court, will be entitled to account further to the Probate court, for all matters arising after such settlement, while he continues to be executor. 7 How. 188.

CHAPTER XLIX.

MARSHALLING ASSETS.*

A prolific source of equitable jurisdiction, and one of much importance in the administration of estates, is technically termed "marshalling assets;" or the arrangement of the funds subject to be administered, so that all parties who have equitable claims upon them may receive their due proportion, notwithstanding other intervening liens and interests or claims to prior satisfaction out of some part of the funds for administration.

The constitution and statutes regulating the jurisdiction and practice of the Probate courts in Mississippi, have not abrogated, nor made concurrent the jurisdiction of equity in this branch of the administration of estates. The right *to direct* the assets to be marshalled, without the power *to enforce* the order, would be nugatory. Without power to grant an injunction; without authority to advise the administrator in the discharge of his duty, it would seem to follow, even if the marshalling assets were not in its nature essentially an *equitable* exercise of power, that the Probate courts, deficient in these indispensable accompaniments of this feature in the administration of estates, could not undertake jurisdiction in such cases. The attempt has not yet been made, or if made, has not undergone the review of the High Court of Errors and Appeals.† The recent adjudications of that court have a

*This chapter was prepared by W. C. SMEDDS, Esq. in the summer of 1845—and as, although brief, it is sufficiently comprehensive on a subject merely *incidental* to the administration of estates of decedent—it is embodied with only the addition of several notes by the compiler of this volume.

†Since this chapter was written, the case of *Robins et al. vs. Norcom et al.*—decided in the High Court of Errors and Appeals—has been reported, by which, it is determined, that "an administrator has no right or power to file a petition in the Probate court, as to the mode of administering the estate." 4 Sm. & M. 332. Such powers belonged to the English Court of Chancery, but it does not thence follow that they belong to our Courts of Probate.—*Ibid.* This case involved only the question, as to the manner in which the administrator should pay a debt due to a Bank whose bills were depreciated, out of the assets liable for the payment of such debt, and did not involve any question by which the usual order of administering assets might be inverted—a question which, in this State, where lands are equally liable with the personalty, (the latter being insufficient,) to the payment *pro rata* of all debts, can hardly arise. And by another statute, the court may order the real estate to be sold for payment of debts in preference to slaves.

tendency to circumscribe into its narrowest limits the exercise of judicial power by the Probate courts; and in all probability will not extend to them the right to entertain creditor's bills to marshal assets. The principles, however, will be the same in whatever tribunal enforced; and as an important part of the administration of assets, need illustration.

In Mississippi, the ground for the exercise of this equitable interposition, is to a great degree happily avoided by the abolition of the preference which prevailed at common law in the right to priority of satisfaction in the different grades of debt; and by the subjection of the real estate of the deceased to the payment of all debts alike; in other words, abolishing the distinction of the common law between debts, both as to priority of satisfaction and the subject matter out of which satisfaction could be had.

The order in which, by the common law, debts of the testator are to be paid, and for the payment of which the assets of the testator were *in their order* liable, has been stated. The equitable rule of marshalling assets, derives a ready illustration from this distinction. At the common law, a specialty creditor had a lien on the real estate for the payment of his debt, and also a right to satisfaction out of the personal assets, while a simple contract creditor could look only to the personalty. If the latter, however, were insufficient for the discharge of both, equity would at the instance of the simple contract creditor, force the other to his lien upon the realty, and leave the personalty to the payment of the debt of least dignity. This is but an exemplification of the general rule which regulates in equity the administration of assets, and which indeed is not alone limited to that, but has a broader application—that “if a creditor has two funds, he shall take his satisfaction (if he may,) out of that fund upon which another creditor has no lien.” 1 John. Ch. Rep. 412; 1 Vesey, 312; 1 Sto. Eq. 527.* This rule is not applied, where it will work injustice

*The principle of marshalling assets, is this—a creditor having the choice of two funds, ought to exercise his right of election in such a manner, as not to injure other creditors, who can resort to *one* only of those funds. But if he in the exercise of his legal rights, exhausts that to which alone other creditors can resort, equity will place them in his situation, so far as he has applied their funds to his claim. 1 Brockenb C. C. rep. 266. [Note concluded next page.]

to the creditor, or other party in interest, or to the common debtor; nor is it applied except in favor of those who are common creditors of the same common debtor, unless some special equity intervene.

The rule which is the basis of equitable action in marshalling assets is, that every claimant upon the assets of the deceased shall by any possible arrangement be satisfied out of those assets to the utmost extent consistent with the nature of their respective claims. 2 Fonb. Eq. B.3, ch.2. It is in the application of this rule to the various phases in which conflicting claimants present themselves, that this doctrine has been elucidated and built up. But a few of its general features need be traced.

As already remarked, wherever the distinction between debts and between realty and personalty in their satisfaction is abolished, much of this doctrine, so far as it relates to the administration of *assets* merely, is in a measure superseded.

In the illustration already given, it will be seen how a court of equity will control the *legal* administration of assets, and force the perhaps unwilling creditor to an election of the fund to which he will resort; so that the one fund accessible only to the other creditor may be reached by him. And if in such case, before the application to equity, the specialty creditor has already received satisfaction out of the personalty, the simple contract creditor will be substituted to all the rights of the specialty creditor, as against the real assets; or if the specialty creditor insist upon his legal right to satisfaction out of the personalty, equity will decree to the other creditor satisfaction *pro tanto* out of the realty.

In the application of this principle, simple contract creditors will be substituted for specialty creditors, but not for judgment creditors. That is, the simple contract creditor cannot charge the lands for so much of the personal funds, as has been applied to the payment of debts due by judgments obtained against the ancestor. The reason is, that the writ of *elegit*, by which the land is charged by the judgment against the ancestor, does not issue simply against the land, but against all the chattels, (save oxen and beasts of the plough,) and if the chattels be sufficient, the land ought not to be extended. The judgment creditor, therefore, has not the election between two funds, (as the specialty creditor has,) and the principle on which assets are marshalled, does not apply to the case.—*Ibid.* When payments have been made by an executor to the vendor of land purchased by the ancestor, the lien of the vendor will be marshalled.—*Ibid.*

A mortgage creditor upon real estate, who has received satisfaction of his debt out of the personalty, will be subjected to the operation of the same principle. The simple contract creditor will take his place in the mortgage as to the land bound; and may even force the heir to refund so much of the personal assets as were applied to the mortgage. 2 Vern. 763; 1 Sto. Eq. 531.

Legatees, in equity, are entitled equally to the benefit of this rule. If the personalty be exhausted by the specialty creditors, they will be substituted to their rights against the realty descended to the heir; and in like manner, to the rights of the mortgagee of real estate, who has exhausted the personalty in the satisfaction of his mortgage. If however the unmortgaged realty be devised, the devisee will hold it against such right to substitution on the part of the legatee, because he is equally the object of the testator's bounty. The mortgaged realty, however, if devised will still be subject to the rule if the mortgage debt be satisfied out of the personalty, because the mortgage was a lien on the land, and the devisee took subject to it.

It is under the application of the same rule that legatees, where land is devised to pay the debts of the testator, and the simple contract debts have been paid out of the personalty and exhausted it, will be entitled to stand in the place of such simple contract debts, in the right to satisfaction out of the lands devised for payment of debts. So also in case a specific legacy be incumbered by mortgage or pledged by the testator, he will if the executor have with the personalty discharged debts of a higher grade having a right to satisfaction out of a different fund, be entitled to stand in the place of the debt so satisfied in its claim upon such fund.

Equity will by operation of the same principle protect the wearing apparel and paraphernalia of the widow from the creditors of her deceased husband. Indeed her necessary wearing apparel is not liable at all to the satisfaction of her husband's debts. But her paraphernalia are. Equity will, however, at her instance, compel creditors entitled to proceed against the real estate to resort to it, rather than the paraphernalia; and if the latter have been actually taken by such creditors, the widow will be allowed to stand in their place.

Heirs and devisees also, in many instances, reap the benefit of this rule.

CHAPTER L.

DEVASTAVIT.

§ 1. Reasonable care and diligence are expected from executors and administrators. Watchfulness ought ever to be brought to the fulfilment of the trust. When these qualities have been exercised, they will not be held responsible for losses, which *prudent* management could not foresee, or avoid. Nor will they be charged with gains which the like conduct on their part has failed to realize. 6 Halst. 145.

The rule is, not to hold them liable on slight grounds, where they have intended fairly to do their duty---4 Gill. & John. 453; 2 Hill's Ch. R. 364---As, where they act fairly, but under a mistake---as by surrendering a term on the supposition it was forfeited, for less than it was worth.---2 John. Cas. 376. But if he discovers his mistake, before the surrender is complete, it will, if then made, be a *devastavit*.---*Ibid*. To render an executor or administrator liable, it must appear that he has been guilty of fraud or gross negligence. 4 B. Monroe's R. 309.

§ 2. An administrator is presumed to have notice of judgments, in force against his intestate at the time of his death---in the county in which he qualified---and in which his intestate was domiciled, or had resided within one year preceding;---but *notice* of all other judgments must be proved like other facts *aliunde*.---5 Dana, 353. And an executor or administrator is not liable for paying a debt of inferior dignity, without notice, actual or con-

structive, of such judgment.---5 Dana, 353.* So, where he pays a *parol* debt, having no notice of a *bond* debt. *Ib.* 351.

An administrator who permits judgment on a *bond*, without pleading a previous outstanding judgment, is as much liable as if he had *paid* the latter. 5 Dana, 351.† See 3 A. K. Marshall, 66.

Where a decedent's estate is solvent, (including his real estate,) and his administrators neglect to apply for a sale of the real estate, and pay out all the personal estate to one creditor, to the exclusion of the rest—*Held*: this is a *devastavit*, and the judgment must be *de bonis testatoris*, notwithstanding the plea of *plene administravit*, which, in Ohio, is an immaterial plea. 5 Ham. 87.

Paying debts of inferior dignity, is not a *devastavit* if the executor retains sufficient assets to pay those of a superior dignity. 4 Call, 308.

Where judgment was rendered against an executor *de bonis*, with execution to be levied on *lands* of the deceased for a certain sum, it is judgment *de terris*, and not evidence of *devastavit* against the executor, on return of *nulla bona*, where levy has been made on lands and part of the money received. 10 S. & R. 348.

If an executor apply the assets of an estate, to the payment of younger judgments, leaving an older one unsatisfied, it amounts to a *devastavit*, and *scire facias* will lie concurrently with an action of debt, but the *sci. fa.* must allege that enough assets came to the hands of the executor to discharge the judgment, and plaintiff can only have judgment of such assets. The defendant is not precluded by former judgment from plea of *plene administravit*. 2 Lomax on Ex'rs. 450, 452; 6 How. 100, cited in Black & Robinson vs. Barton Ex'r., 6 Sm. & M.

If an executor or administrator lets judgment go by default against him, it amounts to a confession of assets; and if he do not

*Judgments on which a year and a day have elapsed without any execution, do not operate *constructive* notice. 5 Dana, 359.

†An agreement at the foot of a judgment against the executors of an executor, that neither they nor the deceased executor shall be liable for the judgment, is a bar to any suit for a *devastavit*, but to a recovery of assets. 3 B. Monroe.

pay the execution or produce assets, he is guilty of a *devastavit*, whereby he subjects himself to an action of debt on the judgment, to be satisfied out of his own goods and chattels. Hardin, 404; Breeze, 179; 3 Stew. 285.

In Mississippi, the common law rule, in relation to assets presumed, does not strictly obtain against executors and administrators. Judgment and proof of assets, are only *prima facie* evidence, which he may rebut by showing, that he had no assets in his hands unadministered, although the estate is not reported insolvent. 7 How. 116.

The decree of a court of Equity, that complainant recover a sum certain of an administrator, and have execution of the estate in his hands to be administered, is not alone sufficient evidence to establish a *devastavit*. 2 How. 617.

Where an administrator after judgment against him *as such*, discovers new debts, and thereupon represents the estate insolvent, and proceeds regularly under the commission, the return of *nulla bona* on the execution does not support a suggestion of *waste*. 5 Greenl. 45.

§ 3. An executor or administrator who, in good faith, permitted the surviving partner of his intestate to sell the partnership stock in the usual course of trade, and forebore to call on the court for its direction, he was not responsible to the creditors for any loss sustained in carrying on the business----4 John. Ch. R. 619—*Aliter*, if the administrator of the deceased partner, put into trade the assets which he had in possession.----*Ibid*.

See also the case of Searles, surv'r. &c.----3 Sm. & M.—cited p.13, *ante*.

§ 4. If executors or administrators suffer debts to be lost by wilful negligence, or want of ordinary care or diligence, they are liable for a *devastavit*. Toller, 424, 430; 11 Wend. 361; 1 Randolph, 113; 9 Mass. 74; 1 Har. & Gill. 88; 10 Yerg. 160.

But they are not chargeable with money which, with reasonable diligence, they have not collected.----1 Iredell, 332. If there be no wilful misconduct nor fraud, they will not be chargeable.----3 Sm. & M. 625. Generally they are not liable till they have received the money. *Ibid*.

Where an administrator delayed bringing suit on a note till about seven years after the intestate's death, he was held liable for the amount. 6 Watts, 250; 7 Dana, 461.

And an administrator omitting to recover debts due securities, which came into his hands, by a solvent debtor in another State, is liable for the amount of such note. 3 Paige's R. 182.

An administrator is presumed to have received the amount of notes taken by him on sale of his intestate's property on a credit, unless the contrary appears.—3 Sm. & M. 473. But he will not be held liable beyond the amount collected, if he shows that he took security good at the time, and the loss occurred by unavoidable casualty.—*Ibid.* If the administrator has failed to return an inventory, or has received and converted to his own use the profits of the estate, or squandered them, he is liable on his bond. 2 How. 822.*

§ 5. Where an administrator has made a compromise of a debt intended for the benefit of an estate, and which has been actually beneficial to such estate, he ought not to be charged with the debt in his account. 9 S. & R. 211; 3 Har. & John. 106.

An administrator may release, compound or novate a debt, and if he acted for the benefit of the estate, he will not be held liable. 3 Sm. & M. 625. But now by act of 1846, ch. 12, sec. 6—it is directed that “the Probate court may order any executor or administrator, who has given bond and qualified, or who may hereafter give bond and qualify, in any of said courts, to act as such, to sell or compromise any claim or claims due the estate of his, her or their testator or testatrix—Provided, however, that said executor or administrator, shall first file his or their petition in said court, setting forth distinctly, the facts on which the application is based. And it shall be made to appear, to the satisfaction of said court, by the affidavit of said petitioner, or by other competent or legal evidence, that such order of sale or compromise will promote the interest of said estate.” And by sec. 7, of the same act, it is further directed, “that no order of sale or compromise shall be made before the term of the court next succeeding that at which the petition is filed for that purpose, nor until notice shall have been

*Of the averment necessary to establish a devastavit—see 6 Howard, 93.

given in some newspaper printed in the county, if there be one, and if not, at the Court-House door and two other public places in the county, for at least twenty days, of the character of the application, distinctly specifying the claim or claims, intended to be sold or compromised. Nor shall any order of sale or compromise of claims, under the provisions of this act, be made until after the lapse of twelve months, from the time at which the letters testamentary or of administration were granted. And by sec. 8, of same act, it is further directed, "that all sales made under and by virtue of the provisions of this act, shall be for *cash*, at the court-house door, on the day prescribed by law for sheriffs' sales—*Provided*, that notice of the time and place of sale, distinctly specifying the claim or claims intended to be sold, shall be posted at the door of the court-house, and be published in some newspaper in the county, if there be one, twenty days previous to the sale."

And by sec. 9, of same act, it is further directed, "that within ninety days after a sale or compromise made as aforesaid, a report under oath, shall be made in court by the executor or administrator, as the case may be, stating explicitly the terms of compromise or sale, which report shall stand for exceptions, until the term next succeeding the return thereof.—And for reasonable cause shown, said report may be disallowed, and said sale or compromise be set aside or vacated."

The effect of this statute, would, it seems, prohibit a compromise of any claim by an executor or administrator in any manner, except what is therein prescribed.

§ 6. If an executor or administrator creates a debt to the estate, which is lost, he must show that the debt was such as a prudent man in his own business would have made, and that reasonable and timely exertions had been made to collect it.—4 B. Mon. 74. And the same exertions must be proved as to debts due at testator's death.—*Ibid.* See sec. 4, *ante*.

§ 7. If an executor or administrator pass a debt for which the estate of the deceased is not liable, it is a *devastavit*. 10 Yerger, 160.

So, if executor being also the testamentary guardian, pays money in his own wrong. *Ibid.*

It will be *waste*, not to plead the *special* statute bar of four years; but it is otherwise of the *general* statute of limitations. 13 Mass. 201; 16 ib. 172, 429; 5 Pick. 140.

And if an administrator release a claim to which he knew his intestate was entitled, he is liable for a *devastavit*, though such release was executed in completion of a prior mistake on the part of the administrator. 2 John. Cas. 376.

If an administrator be guilty of neglect or corruption in not opposing the admission of illegal claims, by the commissioners of an insolvent estate, it seems he will be liable in a special action on the case for waste. 2 Mass. 80.

And, if by the fault of the executor in not collecting personal estate, or in not applying it to the payment of debts, lands are taken from the heir or devisee, he is liable to the party injured, in an action of waste. 4 Mass. 654.

By act of 1846, ch. 12, sec. 13, p. 150, it is enacted, that "in addition to the rules heretofore prescribed and now in force for the proof of claims against the estates of decedents, hereafter it shall not be lawful for any Judge of Probate in this State to allow any claim upon *open account*, nor for any executor or administrator to pay the same, unless the contract or transaction, upon which such open account is founded, shall be first proved before such Judge of Probate, by competent testimony, in addition to the affidavit of the complainant, now required by law—*Provided*, that this section shall not apply to claims of a less amount than twenty dollars." See *ante* 307, 308.

No credit should be allowed to administrator for debts represented to be due from insolvent persons, without proof of the insolvency, and that the debts have not been lost in consequence of his wilful default—4 Dana, 618—And where notes and accounts are contained in the inventory, the administrator should distinctly state which have been paid, and the cause why those not collected were lost—which must be a satisfactory one.—*Ibid.* 619. If the administrator does not distinguish in his inventory good from bad debts all will be presumed good—1 Hayw. 481—unless he show due diligence to collect.—*Ibid.* See *ante* sec. 4.

§ 8. An administrator is not liable if a factor, (who is respectable,) sold goods on a few days credit, and the purchaser failed. 2 M'Cord's Ch. R. 456.

If an administrator be directed to sell at auction, on credit, bearing interest, and sell at private sale, he is chargeable with the difference between a credit and cash price.—5 Munf. 183. So, if he suffers the widow or any of the representatives to take articles at their appraised price *less* than their real value. Toller, 427.

And if the sale be collusive to enable a party interested to buy at *less* than a *fair* price, the executor or the administrator is responsible. 2 Tuck. Com. 406; Toller, 427; 2 M'Cord's Ch. R. 430.

But on an order of sale bearing interest, the executor or administrator may immediately receive the purchase money.—4 Gill. & John. 461.

§ 9. An administrator has no right to involve the estate of his intestate in the risk of trade. Therefore, where he shipped wine belonging to the estate, to the West Indies, and it netted less than value here, he was held accountable for the difference. 1 S. & R. 241. And where an executor, being one of a trading firm, mixed the funds of the testator with those of the firm, and they were thus employed in trade—*Held*: the firm were liable to a legatee. 9 Cowen, 320. And, this although the funds were carried to the executor's account, and the account as to them closed in the partnership books. *Ibid*.*

§ 10. Where an administrator makes distribution and debts afterwards appear, he is liable for a devastavit, and must look for his indemnity to the distributees, and if he took no bond he must abide the consequences. 1 Dana, 514.

Advances made by an administrator to provide for the wants of the infant children of an intestate, till the appointment of a guardian, though not properly a charge on the estate—and though

*But it is the duty of the executor to keep money of the estate properly invested—2 Wend. 77—If they do not, they are liable for interest.—*Ibid*. If robbed of money, he will be exonerated. 1 C. C. E. 96.

regarded as gratuitous, unless charged in the accounts filed with the Ordinary—yet form, when so charged, a charge on the distributive shares of the children. 1 Bailey, 7.

Where the heirs of one who died intestate, supposing that all the debts had been paid by the administrator, divided the real estate among them—after which, one of them cut wood and timber on the land to a large amount, it was held, in a suit against the administrator on his bond, brought by a creditor, that it did not constitute waste in the administrator, and that he was not bound to account for the value of the wood and timber cut—though such estate ultimately proved insolvent, and though the administrator was one of the heirs and participated in the division. 1 Fairf. 365.

No contract arises upon a *devastavit* that will support an action against the executor personally. 12 S. & R. 58.

And a judgment against an executor or administrator, in his individual and not in his representative capacity, will not support an action founded on a *devastavit*. 4 Halst. 379.

In an action against an administrator for a *devastavit*, founded on a contract made before the Kentucky statute of 1821, the administrator is liable for property sold as assets, which would be exempted by that statute. (See act of Mississippi, exempting certain property from execution for debt—How. & H. p. 634)—Act 1839, p. 33.

§ 11. An executor may also be charged with *interest*, in certain cases of misfeasance whereby interest has been lost, which he might have realized.

In general, an administrator should not be charged with interest on funds which belong to the estate, till the expiration of the nine months, within which he cannot be sued. For the law allows him this period in order that he may ascertain the condition of the estate. But if after this period, without any good reason, he permits money to lie on hand, he will make himself thereby liable for interest. So, also if he at any time make use of the money of his intestate, he will be chargeable with interest.—Numerous examples of this rule will be found under the head of “Interest,” *post*.

§ 12. Where a judgment has been rendered for a *devastavit*, the order should be against the executors and administrators and sureties, to be satisfied—1st, of the assets of the deceased; 2d, of the proper goods of the administrators, *then* of the sureties; 3d, of the estate descended to the heirs, if necessary. 3 B. Monroe, 217.

CHAPTER LI.

SET-OFF.

§ 1. An executor or administrator may retain for his own claim on his testator or intestate, against persons holding claims of equal dignity with his own.

This rule is founded in the idea that a mutual indebtedness creates a compensation, or payment of both debts, at the instant when the mutual liability arises—except only as to the excess of the amount of one, over that of the other claim or liability—and also upon the impossibility of the creditor suing himself, and thus like other creditors acquiring a preference. Tucker's Comm. Book, 2, 414—4 Dev. 103.

This right prevails even where the debt from the administrator is due, and the other is not.—3 Burr. 1380. So, where he has another person bound to him as surety of the decedent, and although the debt to him as executor of another and from him individually—and even though his letters be repealed on application of next of kin; and, in all cases where he would be justified in paying it to another—he may retain. Toller, 296.

If one of several joint executors have a claim against the estate, he cannot compel his co-executors to allow and credit it before the Ordinary, but must resort to a court of Equity. 1 South. 189.

§ 2. Any debt or demand, which constitutes a legal *set-off* for or against a decedent, is equally so for or against his executor or administrator—who will not be guilty of a *devastavit*, though judgments and bonds exist against the estate if he allows simple contracts *from* decedent's estate, to be set off against debts of superior dignity to the estate, where the set-off could have been enforced against the decedent during his life-time.—5 Dana, 400. Nor can an administrator be made liable for a *devastavit*, where *as such* he holds demands of his intestate against a creditor exceeding the demand set up against him. 5 B. Monroe, 90.

In an action by an executor, on a writing purporting to have been executed upon a settlement with the testator, the defendant upon showing a mistake in the settlement, may set off any debt due from the testator to him—for which an *indeb. assumpsit* would lie. 1 Marshal, 19.

Debts, to be set off, must be in the same right. Therefore, where suit was brought on a note given by A. administrator of C. which was assigned by B. to D., A. was not permitted to set off a note given by B. to E., and by him assigned to A. the defendant. 1 Murphy, 353.

One of two executors cannot transfer by indorsement a negotiable promissory note made to the two as executors, for a debt due to the testator. 9 Mass. 334.

§ 3. Claims purchased after the testator's death, are no off-set against claims due to him before his death. 20 John. R. 137; 2 Bibb. 262; 1 Wash. 221.

But an administrator may retain assets to satisfy a debt, due to himself on a note of his intestate, indorsed to him after the death of the intestate, but prior to grant of administration. 1 Hawks, 318.

As against a debt due to the deceased at his death, a note of the decedent paid by his surety or endorser after his death, is not a good off-set in a suit by executor or administrator against the latter—So, *vice versa*. 2 Hill's R. 210.

§ 4. A claim against an administrator in his representative capacity, cannot be set off against one sued on in his individual capacity. 9 Pick. 265.

But in an action by an administrator for a debt due to his intestate, the defendant may set off a demand for money paid by him to defray the funeral expenses of the deceased. 16 Pick. 343.

A judgment against an administrator is a set-off against a judgment obtained by him in right of his intestate; and where there are no assets in the administrator's hands, equity will set off other debts for which there is no judgment, no outstanding debts of superior dignity appearing.—4 Bibb. 356; 5 Monroe, 181. But if such superior debt appear exceeding assets, the court will not off-set a debt of the intestate against a claim of the administrator.—4 Bibb. 566

A demand against the intestate is no set-off against a bond given to the administrator. Hardin, 252.

But a purchaser of lands of an intestate sold under an act of assembly by commissioners, for money to be collected and paid over to administrators, may set off in equity a judgment against the administrators as such, which he could not make by execution against the other assets, and may enjoin a judgment for such purchase money recovered by the commissioners, especially as the party, after the return of no assets, might subject choses in action by suit in equity under the statute. 4 Monroe, 1.

§ 5. In an action by the administrators of an insolvent estate, against *two*, upon a joint debt, the defendants are not allowed to set off their *several* claims, allowed by the commissioners of insolvency, against the insolvent estate. 18 Pick. 403.

Where one of *two* joint plaintiffs assigns, (for himself and as agent of his co-plaintiff,) a judgment in their favor, the defendant's administrator cannot set off a debt due by *one* of them to his decedent—2 Sumner's Ct. Ct. R. 409—But if in favor of two partners, and one dies, a claim against the survivor may be set off.—1 Hay. 471.

§ 6. Where an estate is insolvent, a claim against the testator or decedent, subsisting at the time of his death, is a good off-set for the holder against a claim of the decedent against him.—2 Hill's R. 210; 1 Murph. 353; 2 Mass. 498; 15 ib. 389, 407; 3 Pick. 452, 460; 4 ib. 212, 215. (The decisions in Massachusetts are founded on a statute which considers the balance due on an adjustment of mutual claims, to be the amount due.)

And if a creditor having a balance against an insolvent estate, fail to prove his claim before the commissioners, he may nevertheless off-set it against the insolvent's claim against him.—2 Mass. 498.

And where, after a suit is commenced by an administrator, the estate of his intestate is represented insolvent, the defendant may set off a note against the intestate, which falls due pending the suit, though not due when the suit commenced. 2 Metcalf, 255.

In Mississippi, under the law regulating the distribution of an insolvent estate, (see *ante* p. 311,) it was decided that a creditor of an insolvent estate could not off-set his claim against such estate, against a claim due from him to such estate, in a suit by the executor or administrator.—1 How. 95—see also 3 East. 149.—But by an act passed in 1840, it is enacted that where there have been mutual dealings between a creditor and an insolvent decedent, before his death, the creditor shall be allowed the full amount of his claim founded thereon, as against any claim of such insolvent decedent against him.

Therefore, if A. and B. have mutual and subsisting demands against each other, and A. dies insolvent, B.'s claim against A. will be valid off-set to A.'s claim against B., notwithstanding A.'s insolvency. 1 Sm. & M. 191.

But if B. has purchased property at an administrator's sale of the effects of A., he cannot, when A.'s estate is insolvent, buy up claims against the insolvent estate, and off-set them against his debt to the administrator. *Ibid.*

§ 7. A judgment in favor of the Judge of Probate on a probate bond, for benefit of a legatee, against an executor and his sureties, is a good set-off against a judgment in favor of the executor, in his individual capacity against the legatee. 8 Pick. 342.

And in an action by an heir, for his distributive share, decreed by the Probate court, the administrator may set off a debt due from the heir to his ancestor, the intestate. 17 Mass. 81, 93.

The obligor of bonds assigned by a decedent to his daughter's husband as an advancement, if he afterwards becomes his administrator, may set off against the assignee of the husband, the proportion overpaid by him in settling the debts of the intestate, if

it did not appear that he gave to such assignee cause to believe he had no such set-off. 3 S. & R. 200.

But an administrator cannot be excused from accounting to a legatee for a fund assigned to him by the other legatees, in consequence of their having purchased at his sale more than the amount of their shares. 3 Hill's Ch. R. 62.

In a recent case decided in Mississippi, (to be reported in 6 Sm. & M.) it was determined that, where an execution, issued from a judgment affirmed by the High Court of Errors and Appeals—a distribution of the decedent's estate having been made before such affirmance—and the execution had been assigned to one of the distributees who had received his proportion—such execution could not be quashed either on the ground—

1st. That the purchase and assignment of such execution operates as payment—or,

2d. That as the beneficial interest was in one of the distributees, he could not have it levied on property which had been divided out.

Per curiam.—"The question of payment in matters of this kind, is one of intention and understanding of the parties. If these be, that it shall be an assignment, there is nothing in the law to prevent that effect. It passes the beneficial interest and enables the party to use the name of the judgment creditor to his own use."

"There may be questions among the different distributees of the estate as to the proportions in which they shall contribute to the payment of this claim. But this point cannot now arise.—The whole estate was bound, and on motion to quash, the court could not adjust the equities." *Vanhouten vs. Reiley's adm'r.* Query—Could not the execution be enjoined till the proportions could be adjusted, and the execution be credited with the holder's rateable proportion?

On a decree to set aside a sale of the real estate of decedent as void, the court will order an account of the rents of the land to be charged to the purchaser; and the value of all the permanent improvements not exceeding the rents, to be credited or *set off* against the same. 3 Sm. & M. 715.

CHAPTER LII.

COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

§ 1. There is no universal rule for fixing the compensation of executors and administrators. Five per cent on money received and paid out, is generally an approved allowance. In some extraordinary cases, additional charges for expenses *per diem*, attendance, &c. may be proper; but such charges should be moderate, and rigidly scrutinized, and allowed only when extraordinary services have been required, of which satisfactory proof must be rendered. Running up accounts for attending courts, magistrates' trials, &c. should not be encouraged---5 Dana, 42; 2 Hayw. 104; 9 S. & R. 209; 1 Baldwin, 380---Nor will expenses incurred about a suit to coerce a settlement with him be allowed. 5 Dana, 43.

An allowance of five per cent. is especially proper where he is charged with the interest; and an omission to charge for his services does not prove that he waived his claim---7 Dana, 16. And where an allowance of fifty dollars was made, when commissions at five per cent. would have made \$100, and no reason appeared for a smaller allowance than five per cent., it was disapproved---4 Dana, 602. But the court *may* allow less than five per cent. 2 Murphy, 332.

In Virginia it was held, a commission of $7\frac{1}{2}$ per cent. on the amount of sales and collections, ought not to be allowed an executor, except on peculiar circumstances---2 Munford, 242. In Pennsylvania, where the estate was large, and there was little trouble, three per cent. was deemed sufficient. 9 S. & R. 204, 223.

In Maryland, an executor was allowed *five* per cent. commission on the amount of inventory returned by him, excluding what may have been lost, or have perished---4 Har. & John. 12; 5 Gill. & John. 60. The statute declaring that not less than 5 per cent. shall be allowed, applies only to cases of *full administration*, by

the *first* executor or administrator. In case of partial administration, the court may allow therefor, so much as it actually deserves—one per cent. or even less.—*Ibid.* The allowance of commissions to an administrator *ad colligendum*, can have no effect on the compensation of the executor or administrator of the same estate. They are distinct and independent allowances for different services. 3 Gill. & John. 20—See also 1 Ash. 323.

An executor is entitled to a *per centage*, for converting into money neat stock, &c., received by him on notes so payable; and where he kept no exact account of the cost and loss of such collection and conversion, he is entitled to a reasonable per centage. And delay in the settlement of the estate, owing to *laches* of the executor, will not deprive him of compensation for actual services rendered. 2 Verm. 294.

The rate of compensation may be varied according to circumstances; and an executor or administrator may reasonably be allowed a commission of 10 per cent. on money received by him, where the debts were small and numerous, and the debtors dispersed.—3 Munf. 198; 9 S. & R. 209. And an executor charged by a will to manage lands involved in controversy, who performs the duty with skill and diligence, is not limited in his compensation to the ordinary rules—5 Munroe, 65—Not allowed commissions on a debt due to them as executors of another person. 2 Murphy, 331.

The allowance to the administrator by the court of Probates, as compensation for administering the same, cannot be made until a final settlement of the estate. 7 How. 271; 9 S. & R. 223.—The office is not intended as one of profit, and only a bare compensation can be allowed. 2 Hawks, 30; 1 Dev. Eq. 269.

An executor cannot retain his commissions against the creditors or legatees, till they are allowed by the court of Probates, in a suit for a settlement of his accounts. They cannot be allowed by a jury on a plea of *plene administravit*—3 Dev. 353. Interest on compensation not allowed. 1 S. & R. 241; 6 Watts, 236.

In Mississippi, the statute authorises the court to allow commissions on property lost or perished, without any default of the administrator, and also on the increase of the property; and in all

cases the court shall allow such compensation as it may consider reasonable and just, not less than *five* nor more than *ten* per cent. How. & H. 414. By act of 1844, the allowance is limited to *five* per cent.—See ch. 12, sec. 1, acts of 1844—But see act of 1846.

§ 2. Whether an executor or administrator will be allowed commissions on the proceeds of land directed to be sold, by the testator, or by the court, see 1 Devereaux, 428; 1 Dev. Eq. 195, 329.

In Mississippi, “the law does not impose onerous duties on men without allowing compensation.” And therefore, “the act of the legislature which allows the administrator, as compensation for administering the estate, or certain *per centage* on the “appraised value,” was intended to embrace the whole estate administered, and is not confined to that portion of the estate which is actually appraised—7 How. 271. It also embraces real estate sold by an administrator, under an order of court.—*Ibid.* 612—See 6 Gill. & John. 171.

Payments made to the distributees, on account of their portions, whether before the administration is settled, or at the close of it, are not considered as expenditures, and no commissions can be allowed on them—2 Hawks, 30; 2 Dev. Eq. 1—nor on payment of debt due to the executors themselves.

But executors charged with the management of legacies to infants, are entitled to commissions. 2 Dev. Eq. 488.

The executor may be allowed compensation for services rendered to the estate of the deceased, in finishing the growing crops, if his services are of advantage to the estate. 6 Gill. & John. 316.

§ 3. Where there were two executors, and one took on himself more than half the trouble and risk, it was held he was entitled to more than a moiety of the commissions—1 Dev. Eq. 269.—They take commissions *as executors* to be divided according to their several degrees of labor, and on the death of one, who had possession of the fund, the survivor is not entitled to *another* commission. 2 Dev. Eq. 488—See also 1 Dev. & Batt. Eq. 564; 9 S. & R. 223. Executors may agree as to their respective proportions. 5 Wh. 228.

One administrator cannot retain the *whole* commission, on the ground that he had solely transacted the business of the administration. 4 Har. & J. 275.

§ 4. Commissions shall not be allowed to a dishonest executor or administrator. 2 Dev. Eq. 1.

Therefore, where an administrator *pendente lite*, set up an unfounded claim in his own name against the estate, and attempted thereby to appropriate nearly the whole estate to his own use, the court refused to allow him any compensation for his services. 4 Watts, 77.

It is not a universal rule that an administrator who keeps no accounts, shall be allowed no commissions. It is however a general rule, and will only admit of an exception under very peculiar circumstances. 2 Dev. Eq. 137.

CHAPTER LIII.

LIMITATION.

§ 1. A promise by an executor or administrator, will take a debt of the testator or intestate, out of the general statute of limitations. But in suing on such promise, the declaration of the plaintiff must specially aver it. See 1 Henn. & M. 563; 2 ib. 406; 9 Leigh, 45, 381; 2 ib. 532; 5 Rand. 437.

An executor or administrator is not bound and cannot be compelled to plead the general statute of limitations. 1 Atk. 526; 15 Ves. 499; 2 Dess. 577—(But see 9 Dow. & Ryl. 40, *contra*, where action was brought twenty years after the testator's death.)—See also 11 Leigh. 1, where Tucker, Prést. said—The cases show that it is by no means a settled rule elsewhere, that an executor may of his own will, and against the interest and express directions of

the parties interested, saddle the estate with a debt, which he might have successfully resisted." *Ibid.* 39—See also 5 J. J. Marsh. 255, & 1st Wharton, 66, reviewing 5 Binney, 573; 14 Serg. & R. 195; 15 ib. 231; 12 Wheat. 565; & 7 Connt. R. 178; and see 1 M'Cord's Ch. R. 175.

§ 2. But the mere acknowledgment of the existence of a debt is not sufficient. There must be an express promise to pay it;—and if there be more than one executor, all must join in the promise. 21 Eng. C. L. R. 478; 9 D. & R. 40; 3 Call, 248; 3 Hen. & Munf. 89; 12 Wheat. 565, citing 8 Cranch. 72, and 11 Wheat. 209; 5 J. J. Marsh. 255.

In the case of an acknowledgment by an executor or administrator, there is *locus penitentiae*, (room for recantation,) and the personal representative should not be compelled to pay a demand barred by time, unless for a legal consideration he had expressly undertaken to pay it. 12 Wheat. 565—and see 3 Shep. (Maine) R. 360, *accordant*. A promise to "settle the note," is equivalent to a promise to pay. 8 Wend. 600.

§ 3. It has been held that an executor cannot retain for a debt due to himself by his testator, against which the statute of limitations had run in the life-time of the testator. 3 Wend. 502; 2 Pick. 567; 5 ib. 140; 4 Monroe, 37.

By act of Mississippi, "in no case will an executor or administrator be allowed to retain for his own claim against the deceased, unless the same be passed by the Probate court; and every such claim shall stand on an *equal* footing with other claims of the *same* nature. How. & H. 411.

§ 4. In an action against an administrator *de bonis non*, the plaintiff may join promises, made by the testator, with one made by his executor before revocation of his letters, and one made by the administrator *de bonis non*. 2 Leigh, 532; 6 John. R. 112; 15 ib. 3; 4 Cowen, 493; 6 John Ch. R. 373; 2 Dess. Eq. R. 577; 2 Rep. Const. Ct. 111; 1 Har. & John. 191; 4 ib. 527.

§ 5. The power of the executor to defeat the operation of the statute, ceases after a decree for an account, in a suit for the administration of the assets, which put it out of his power to affect the relative rights of creditors—1 Russ. & Myl. 347; 2 ib. 75—

And after the decree, any executor may take advantage of the statute, before the master, though the executor refuses.

But before the decree, the court will not interfere in favor of the residuary legatee, to compel the executor to plead the statute. Prec. Ch. 99; 1 Eq. Cas. abr. 305.

§ 6. An acknowledgment of, or promise to pay, by an executor or administrator, a debt due from the deceased, will not avoid the operation of the special statute of limitation, by which the liability of executors and administrators to suits, is limited to four years from the time of accepting the trust; because that statute was made for the benefit of the estates of deceased persons, and those interested in them, and not for the personal convenience of the executors or administrators.—13 Mass. 201; 16 ib. 172; 15 ib. 6, 58; Kirby, 423; 5 Pick. 140. If a claim originates *after*, and cannot be ascertained within the time limited by the court of Probates for the exhibition of claims, it is not barred by the non-exhibition of it, within such time. 6 Conn. 258.

Where an executor or administrator is sued upon a claim against the testator or intestate, and a special plea in bar of the action is filed—setting up the action of limitations of eighteen months, the plea will be defective, unless it sets forth the date of letters testamentary or of administration, that there was publication within two months after such date, and that such publication was continued for six weeks successively. 1 How. 115.

§ 7. By act of Mississippi, 1846, it is provided, “that so much of the law to which this is an amendment, (see *ante*, sec. 1, p. 309) as allows to creditors of an estate resident within this State, 18 months—and to non-resident creditors three years, within which to present their claims against said estate, be and the same is hereby repealed: and, hereafter, all claims against the estate of a deceased person, shall be presented to the executor or administrator thereof, within two years after advertisement made of the grant of letters testamentary or of administration, or they shall be barred. And to authorise the collection of any claim and the payment thereof, the same shall first be probated by the court in which the estate is administered—shall be recorded therein, and shall be certified by the judge thereof, under his hand, as “examined and allowed.” Ch. 12, sec. 10, act of 1846, p. 149. For

what constitutes a sufficient presentation, see *ante* sec. 2 and 3, p. 310.

By the same act, (ch. 12, sec. 14, act of 1846, p. 151) it is enacted that, "in any proceedings of the Probate courts of this State, in which any executor or administrator may *contest any claim* exhibited against the estate of any decedent, the Probate court may, at its discretion, refer the same to auditors, who may proceed thereon, subject to the rules, and exercise all the powers which are incident to and belong to the office of a Master in Chancery, under the laws and usages in force in this State." See *ante*, note to sec. 10, p. 317, and sec. 1, p. 313.

§ 8. A claim growing out of a warranty broken before the death of the testator, is subject to the operation of the statutes requiring claims to be presented within eighteen months after notice. 4 How. 246.

The statute of limitations does not bar the remainder-man in slaves, until six years after the termination of the particular estate. *Ibid.* 204.

Where G. became administrator in right of his wife, but failed to make distribution, or settle the estate according to law, and pleaded the statute of limitation to the bill of the distributees—*Held*, the facts constituted a *subsisting trust*, and the suit was not barred. 1 How. 365.

CHAPTER LIV.

INTEREST.

§ 1. An administrator should be charged with interest on money received for the estate during any delay in its settlement, or when he can be fairly presumed to have used the money, or to have had a safe opportunity to have kept it on interest. 4 Vermt. 256; 5 N. Hamp. 492; 11 S. & R. 16; 1 Dev. Eq. 364, 369.—And it seems where he *used* money of the estate for his own profit, he will be chargeable with compound interest, so as to make annual rests, during the whole period of fourteen years—2 Vermt. 294—so, if he has used any part—1 Dev. Eq. 369—or if he has kept no accounts—*Ibid.* 4 Humph. 215.

But where a fund was to be invested, and the surplus of the interest not used in the education of a minor, was to be invested, it was held, that the executors were not chargeable with *compound* interest, for neglecting such directions.—2 Rawle, 305.—Yet it seems, that where a will directs the executor, to place out at interest, the interest which he received, for the purpose of accumulation, and the executor renders no account of the disposition of the funds, or what he *actually* received, he ought to be charged as nearly as the same can be ascertained, with all he might have made, or have received, in the exercise of due diligence and exertion. He ought to be charged with the annual interest on the principal sum, and allowing *six months* for receipt and investment, after the manner of the civil law, he ought to be charged with interest on the annual amounts of interest from the end of six months after they respectively fall due, as long as the capital has remained in his hands. 6 Halst. 145.

Where the testator leaves the same person executor of his will, and guardian of his children, he is chargeable with simple interest only, for the time he was acting as executor; but from the time the administration of the estate was or might have been concluded, he is to be charged with compound interest—unless he can

show special equitable circumstances to discharge him of such accountability.---1 Dev. & Batt. Eq. 564. On this subject, see 1 John. Ch. R. 512, 535, 624, and 2 Wend. 77.

§ 2. If executors convert property into cash, during the first year after the testator's decease, they are chargeable with interest. 6 Watts, 250.

An executor or administrator in South-Carolina, is liable for interest on the amount of the sale bill, only from the end of the current year in which it became due.

In general, the executor is liable for the current rate of interest that may be obtained on the description of property in his hands. 2 Rawle, 305.

Interest not chargeable, where the administrator has retained money till a suit respecting the right thereto shall be determined. 1 Wash. C. C. 477.

In general, an executor or administrator, having faithfully discharged his trust, having exercised prudent care, just activity, reasonable skill, and proper diligence, should be charged only with the interest he has made. 6 Halst. 145.

§ 3. Executors and administrators may be examined on oath, upon interrogatories before the Judge of Probates, in order to ascertain whether he is liable to pay interest on money of the intestate's estate---6 Pick. 423---Also to ascertain what use they have made of the money. 5 N. Hamp. 492.

And in North-Carolina, an executor will be charged with interest, unless he produce an account and swear that he has not used the fund nor loaned it to others, but has kept it on hand for the purposes of his trust, and is to be charged with interest from the date of his receipt of the trust money. 1 Dev. Eq. 369.

§ 4. An administrator was allowed to charge interest in his account upon a private debt due him from the intestate, calculated for the period of 18 months after taking administration, it being considered that the estate might have been settled within that period. 2 Pick. 567.

Circumstances may exist which will not only justify but commend an advance of money by an administrator, and entitle him to interest; but a charge of interest will be viewed with caution,

and the circumstances offered to sustain it, will be examined with extreme care. 6 Halsted, 44—See also Williams on Executors, 1141.

When allowed, interest must commence from the time when a balance is struck on the general report—for, till then, it cannot be ascertained that the executor or administrator had not money in his hands. Wms. on Ex'rs. 1141.

§ 5. Where an administrator, several months after having settled his accounts, presented a petition for a commission, it was held that the account was thereby opened so that certain omissions might be corrected. And a settlement of an administrator's account, in which he does not charge himself with interest on money received, the question of interest not being examined—does not preclude a subsequent enquiry.

CHAPTER LV.

COSTS—WHEN ADMINISTRATOR ENTITLED TO.

§ 1. As a general rule, an executor or administrator, who sues in right of his testator, and fails, is not liable for costs—2 Bay. 166; 1 Bailey, 79; 2 ib. 6; 2 Litt. 387; 2 J.J. Marsh. 499; 6 Cowen, 612; 3 Dana, 157—especially if he sues *bona fide*, and not with any wanton or vexatious object.—*Ibid.* Nor, is he liable for not going to trial, if he show due diligence to be prepared for trial, and that he is prevented without any fault or *laches* on his part.—4 Cowen, 551; 2 Bay. 399. They are not liable for costs unless guilty of a violation of duty—7 Wend. 522. If he bring a wrong action by mistake, he is not liable to costs—3 John. 249. Administrators made parties defendant by sci. fa. are not liable for

costs---5 Ham. 45---So, where he comes in to prosecute---2 Pick. 68; 11 ib. 389---So, where they suffered non-suit in an action on a promise to the decedent, in his life-time---2 Bailey, 53; ib. — So, if plea of *plene administravit* is admitted by the plaintiff, and judgment *quando acciderint*---1 Wendel, 68---So, where heir pleads general issue and *riens per descent*, and the plaintiff admits the latter plea---1 Wend. 69---So, where set-off is pleaded and allowed, which a claimant would not allow—the resistance would not be deemed unreasonable. 7 ib. 522.

A judgment *quando* is a judgment in favor of the defendant, who is therefore entitled to his costs. 1 Dev. 228.

Where an administrator establishes his plea of "*plene administravit*," he is entitled to judgment and execution for costs immediately against the plaintiff. 1 Murph. 502.

In Mississippi, it is enacted, that executors, administrators and collectors, shall have full power and authority to commence and prosecute any personal action whatever, at law or in equity, (as the case may require,) which the testator or intestate might have commenced and prosecuted—except actions for slander, and for injuries and torts done to the person;—and they shall also be liable to be sued in any court of law or equity, (as the case may require,) in any action (except as aforesaid,) which might have been maintained against the deceased; and they shall be entitled to, or be answerable for *costs* in the same manner, as the deceased would have been; and they shall be allowed for the same in their accounts:—*Provided*, the court awarding costs against them, shall certify there were probable grounds for instituting, prosecuting or defending, the action on which a judgment or decree shall have been rendered against him. And in no action, against an executor, administrator or collector, shall he be compelled to put in special bail. How. & H. 412—Act 1821.

Probate courts are excepted from the operation of the act of 1846, chap. 46, p. 219—regulating collection of costs, &c.

COSTS—WHEN ADM'R. LIABLE FOR.

§ 2. Executors are *personally* liable for costs where they plead a plea, which is found against them, or one which is not true in point of fact---2 John. 377---or where they commence an action and fail to support it---16 Mass. 530—See also 2 Root, 398.

In trover, by executors, for conversion after the testator's death, if they are non-suited, they are liable for costs.—5 Cowen, 267; 2 Bay. 166; 2 Bailey, 319.

If an executor sue as such, when he might have sued in his own name, and fails, he shall pay costs—otherwise, if he necessarily sue as executor. Thus, where an executor declared on a promissory note, and for money lent, &c. in the life-time of his testator, averring a promise to himself as executor, after the testator's death, and was non-suited at the trial—*Held*, that he should not pay the cost. 4 Cowen, 550; *ib.* 87; 2 Bay. 166; 11 S. & R. 247.

Administrators contesting for their own interest the claims of heirs, are bound, in case of failure, to pay the expenses of the suit out of their own pockets—5 Binn. 138. And an executor, contesting for the validity of a will, is personally liable for fees paid to counsel. 3 W. & S. 441; 1 Murph. 436.

An executor is liable for costs, on a motion for a judgment, as in case of a non-suit, unless diligence is shown to have been used, in the prosecution of the suit. 1 Wend. 34.

An administrator is also liable for costs, if he suffer judgment by default—1 Hill (S. Car.) 239. On abatement of suit by death of plaintiff, no execution for costs should issue without a *sci. fa.* to his representatives. 2 Hay. 341.

Administrators are liable for fees due to the Prothonotary and other officers. 11 S. & R. 247.

An administrator will not be credited with counsel's fees paid for making an unjust and vexatious defence, to the claim of the next of kin. 6 Whart. 401.

And where he has resisted the payment of a just debt without reason, and when he had assets in his hands, he cannot charge the costs of the recovery of such debt to the estate. 6 Watts, 236.

An administrator will not be allowed for fees paid for professional services, in a suit against him for a specific legacy, where the contest was between different claimants of the legacy, and the residuary legatees had no interest in the result. *Ib.* 250.

Where after a will had been proved, and letters testamentary granted to the executor, who had married a daughter of the testator, and one of the sons alleged that a conveyance of the estate

had been made to him by the testator in his life-time, whereupon the Register's court directed an issue of *revocavit vel non*, which was decided *against* the will—upon which the executor took a writ of error from the Supreme court—but the parties interested under the will, having executed releases to the son, setting up the conveyance, the executor discontinued the writ of error—*Held*: he was entitled to charge the estate with the *costs* of litigation. 9 Watts, 284.

Where an administrator omits to plead *no assets*, and a verdict is rendered against him on his other plea, the judgment must be for costs *de bonis propriis*—1 Hay. 218, 298. Administrators defendant are generally liable for costs *de bonis propriis*, unless some plea to the whole action be found in their favor. 4 Dev. 581.

CHAPTER LVI.

ADMINISTRATION---WHERE NO EXECUTOR OR ADMINISTRATOR WILL QUALIFY.

§ 1. "Whenever it shall appear to any Judge of Probate, that any individual or person deceased, with or without a last will, in the county to which he is Judge, and that no executor or administrator having been appointed by said deceased by any last will or testament, or if appointed by said deceased, and fails or refuses to qualify as said executor, and take upon himself the trust, and proceed to execute the same, and no person will take letters of administration with or without a will, on the estate of the deceased—it shall be the duty of the court of Probates of the county in which said person deceased, to order the Sheriff of the county to take possession of said estate; and it shall be the duty of said Sheriff to administer said estate according to law—in such cases,

under the control and direction of the court of Probates—in the same manner and according to the same regulations, as are in force in cases of administration, with or without the will annexed.” And further—

“Upon the expiration of the term of office of any Sheriff, to whom administration of any estate shall have been committed, to make with the Probate court a full settlement of his account of administration of said estate, and to hand over to his successor in office, any portion of said estate which may remain unadministered in his hands, upon the order of the court;—and such sheriff and his securities upon his official bond, shall be liable to any party interested in the estate—for *devastavit*, or other improper management of said estate, in the same manner, to the same extent as administrators with the will annexed, and their securities are liable thereon.”

And further—“This act shall be in force from and after the first Monday of November, 1847, and not before.” Acts of 1846, chap. 25, p. 185.

CHAPTER LVII.

ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

§ 1. By act of 1826, executors and administrators are authorized to commence and prosecute any suit which their decedent could have done (except actions for slander and for injuries and torts done to the person)—See ante page 363—And they shall be likewise liable to an action.—*Ib.* How. & H. 412.

§ 2. By act of 1821, “All actions which have been commenced and prosecuted for, or against any testator or intestate, (except actions for slander and for injuries or torts done to the person,)”

shall, and are hereby declared to survive *for and against* executors and administrators with the same effect they might or could have been had or maintained for or against the testator or intestate, any law, usage or custom to the contrary in any wise notwithstanding." How. & H. 414.

§ 3. By act of 1830—"The act to which this is an amendment, (act of 1821, How. & H. 417,) shall be so construed as to authorise any suit or suits to be brought by persons interested in the estate of any deceased person, as creditors or otherwise, on any bond given by administrators or executors, against such executors or administrators and their sureties, jointly in the first instance, and in no case shall a separate suit be necessary against any executor or administrator, for the establishment of a *devastavit*, prior to the liability of such securities." How. & H. 419.

§ 4. For liability of persons intermeddling with goods of decedent---see How. & H. 415, and *ante*, note to p. 227.

§ 5. Act of 1821, provides that where securities of an executor or administrator take charge of the property, they shall be liable to sue and be sued, in the same manner as an executor or administrator. How. & H. 399.

§ 6. By act of 1822, "Actions of account may be brought against the executors or administrators of every guardian, bailiff, and receiver, and also by one joint tenant or tenant in common, his executor or administrator, against the other as bailiff, for receiving more than comes to his just share or proportion—and against the executors or administrators of such joint tenant in common. *Ibid.* 547.

§ 7. By act of 1822—"The executors or administrators of any person to whom rent is due, and not paid at the time of his death, may have an action of debt against the tenant or his executors or administrators—and also distrain therefor, while in possession of the tenant, or of any person claiming through him, in like manner and form as their testator or intestate might have done, and may make recovery in the matter as aforesaid. *Ibid.* 563.

By act of 1822, the same remedy is given where the demise or lease is determined. *Ibid.*

§ 8. "No action, or suit at law or in equity, shall be brought against any executor, administrator, or other person or persons having the charge or management of the estate of a testator or intestate, upon any judgment or other cause of action, against his testator or intestate; nor shall any *scire facias* be issued against an executor, administrator, or other person or persons, having the charge or management of the estate of an intestate or testator, to revive any judgment or other cause of action, after the expiration of *four* years, from the qualification of such executor, administrator or other person, having charge or management of the estate. And all such judgments or other causes of action, after the expiration of four years, as aforesaid, upon which no proceedings shall have been had, shall be deemed to have been paid and discharged, saving to all persons *non compos mentis*, *femes covert*s, under twenty-one years of age, without the limits of the United States, or personally imprisoned, who may be entitled to the benefit of such judgment, or other cause of action, *two* years, after their several disabilities are removed, within which to commence their action." Act of 1822—How. & H. 412—Act of 1844, chap. 9, sec. 12.

§ 9. By act of 1846—"Whenever any suits shall have been or may be hereafter instituted by any administrator *ad colligendum*, or by or against any executor or administrator having plenary powers, and the powers of such administrator *ad colligendum*, executor or administrator having plenary powers, shall cease, or be determined, and afterwards letters of administration or testamentary shall be granted, such suits shall not abate at law, or be dismissed in equity, but shall continue and may be revived by *scire facias* at law or by bill of revivor in equity."

And further—"When any judgment or decree shall have been or may hereafter be rendered, at law, or in equity, in favor of an administrator *ad colligendum*, or in favor of or against an executor or administrator having plenary powers, and the powers of such administrator *ad colligendum*, executor or administrator, having plenary powers, shall cease or be determined, and letters testamentary or of administration, shall afterwards be granted, such judgments or decrees may be revived by *scire facias* at law, or bill of revivor in equity."

And further—"All writs of replevin, attachments, injunctions, and other restraining orders or process, and all bonds taken by virtue of them, shall continue in force, in all such cases, in as full and ample a manner, as if the powers of such *administrator ad colligendum*, executor or administrator having plenary powers, had not ceased or been determined; and that this act take effect from and after its passage—*Provided*, that any execution issued upon such judgment, shall only be levied upon the lands and tenements so recovered; and that a sale of such lands and tenements, by said execution, shall satisfy said execution and judgment, whether the amount of money realised from said sale shall equal the amount of the judgment or not." Act of 1846, ch. 27, p. 187-9.

§ 10. It is a regular proceeding to sue out a *scire facias*, on a judgment against an executor or administrator, and obtain an award of execution *de bonis propriis*, by proving a *devastavit*—1 How. 271. But it will be error unless there be proof of *devastavit*. *Ibid.*—5 How. 59.

The allegations of a *scire facias*, are not of themselves sufficient to justify a judgment final, by default. *Ibid.*

Scire facias against an administrator to revive a suit, is not in the character of an action, and may be maintained before the expiration of the *nine* months allowed by statute, before administrators are suable in their representative capacity—1 How. 273—But it partakes so much of the nature of an original action, as to justify a plea in defence thereof. *Ibid.* 271.

On *scire facias* to revive, judgment should be rendered against the defendants in their representative character, or it will be error. 1 How. 273.

Suits against administrators shall not abate in consequence of the insolvency of the estate of the deceased, but shall be prosecuted to final judgment. *Ibid.*

The sureties of an administrator, must be sued at law, after proceedings to fix the liability of the administrator. 5 How. 638.

See ante. pages 242, 243, for proceedings on administrator's bond.

§ 11. In Mississippi, the administrator is not bound to plead any thing but the general issue—He may elect to plead specially. 6 How. 279.

When the plea of non assumpsit pleaded generally by an executor or administrator, will not authorise a verdict against him in his own right.—*Ibid.*—2 How. 616; 4 Sm. & M. 113.

Where in a suit against an administrator, on his bond, to recover a debt due by the intestate, he pleaded that the right of action did not accrue, within six years before the commencement of the suit—*held*, the plea was bad. The defendant should have averred his exemption from liability to pay as administrator, at the time of the presentation of the claim. 4 How. 242.

The executor is individually responsible where he promises to pay an account stated, when it does not appear that it was for money due by the testator, although he expressly promised “as executor.” 3 How. 176.

In a suit on an executor's bond, for the use of an assignee of a legacy, it is no bar to the action, that the plaintiff is administrator of one of the joint obligors. 1 How. 297.

§ 12. A sheriff having execution against the goods and chattels of decedent, &c. must distinguish between the property of the decedent and the individual property of the administrator.—1 How. 50. The administrator's goods are no more liable than those of a stranger. *Ibid.*

A judgment against executor generally *de bonis propriis*, is erroneous. 4 Sm. & M. 113.

§ 13. An action is not maintainable against an administrator, personally, unless he is fixed with assets. 3 Dev. 101.

A judgment *quando*, does not fix the administrator with assets; and as to a scire facias on it, he may show an application of subsequent assets to debts of higher dignity. 4 Dev. 44.

Assets being a trust fund, courts of Equity may exercise jurisdiction to compel discovery of assets, and their application to payment of debts, even a debt without judgment—3 Dana, 392—And the case is stronger when there is judgment, and *nulla bona* is returned on the execution—and still clearer if no inventory of

the estate, so that a discovery may be essential to aid an action for a *devastavit*. 5 Dana, 410.

Where a plaintiff fixes an administrator with assets, he shall have judgment for that amount, and for the residue, *quando acciderint*. 1 Dev. 442.

If in an action against administrator, he plead "no assets," which jury find true, and plaintiff signs judgment and then sues out *sci. fa.* against the heirs at law, to subject real estate of debtor to payment of the debt—and pending *sci. fa.* assets come to the administrator's hands, the plaintiff cannot have a *sci. fa.* against the administrator to subject those assets, the judgment not having been entered *quando acciderint*. 2 Murph. 281.

Plea of "plene administravit," must be received at all times, provided the defendant does not come in with it, at a very late period to delay the trial. 1 Hayw. 484.

A judgment in one State *de bonis propriis*, is proof of assets, and in debt on such judgment in another State, the judgment is *de bonis propriis*. 2 Hayw. 490.

Executors, being sued as such, pleaded non assumpsit, and plene administravit—Jury found on first plea, for plaintiff; but did not respond on the second. Upon a *sci. fa.* to charge executors *de bonis propriis*, executors are permitted ex necessitate, to plead *plene administravit*, but the plea must relate to the *teste* of the *first* process, and they would not be entitled to such plea *now*, had they not pleaded it in the first action. 2 Hayw. 166; 2 ib. 271.

In suit for *devastavit*, and plea of plene administravit—and verdict for plaintiff—the jury should ascertain, and the verdict must show the amount of assets wasted or unadministered; for beyond that the statute (in Kentucky,) exempts administrators.—3 Dana, 137.

§ 14. It is not intended to embrace within this work a full treatise on the practice of other than the Courts of Probate, in suits by and against administrators. The foregoing examples have been inserted, because they fall appropriately in with the subjects contained in this and some preceding chapters.

CHAPTER LVIII.

DOWER—WHAT?

§ 1. Dower is that provision which the law makes for the support of the widow, and the nurture, maintenance and education of her children.—Bracton, book 2, ch. 39, sec. 4—cited in Roper on Bar & Feme, 100. This right has existed in all nations of Teutonic origin. 11 Ohio Reps. 219.

This right is *contingent* during husband's life, (or *inchoate*,) and rendered *absolute* by his death.—1 Cowen, 89. It is an *ex-crescent* interest, growing out of the inheritance for a time, after which it falls again into the inheritance. 1 Dallas, 419.

It is inseparable from seizin acquired by husband—1 Cowen, 89—and is in *continuation* thereof—4 Mass. 384, 388; 1 Pick. 314, 317; 1 Pick. 189, 196. Seizin, actual or constructive, must be shown—3 How. 205; 1 Sm. & M. 527; 7 Mass. 253.

Three incidents are requisite to dower—1st. Marriage—2d. Seizin—3d. Death of the husband.—1 Inst. 32, a. b.

§ 2. Dower is favored in law in a high degree, and is held sacred only next to life and liberty.—Lilly's abr. 666.

It is founded on a *legal, equitable, and moral* right.—Prec. in Chan. 344. Being a legal right, it cannot be affected by any act of the husband. 5 Hill, 206.*

§ 3. Dower is not alienable, but it may be released.—1 Cowen, 89. Until assignment, it cannot be leased.—13 Pick. 33. Nor is it subject to execution, till assigned.—14 Mass. 378.†

*Dower is a legal right, and whether claimed by suit in law or equity, the principle is the same. 15 Peters 21.

† But widow cannot enter till the heir assigns, or legal proceedings are had.—4 Mass. 384; 9 ib. 13; 16 ib. 191.

§ 4. The right of dower is *inchoate* by marriage, and *consummate* at death of husband. It relates back to the date of the marriage, and cuts out all intermediate incumbrances, to which the wife has not consented, in the mode prescribed by law. 1 Cowen's repts. 89.

The right of dower is paramount to the right of the heirs—2 Root, 50.

It will be preferred to husband's creditors—4 Yerger, 218—although land has been sold *after* his death under a *feri facias*.—*Ibid.*—and see 3 Dever. 3; 2 Root, 50.*

DOWER---WHO ENTITLED.

§ 5. Only the *actual* wife of a man, at the time of his death, is entitled to dower of his estate. Black. Com. 130.

If, therefore, a wife be *divorced* from her husband before his death, she will not be entitled to dower—unless it be only *a mensa et thoro*—which does not dissolve the marriage, and therefore does not destroy dower, which is one of the incidents thereof.—*Ibid.*

But divorce, even if *a mensa et thoro* only, will bar dower, if it be on account of adultery of wife.—*Ibid.* See also Roper on Bar. & Feme. 101.

If divorced for adultery of her husband, the wife may be endowed of *all* the lands, of which her husband was seized during coverture, though alienated before decree of divorce. 14 Mass. 219.

§ 6. The wife must be above nine years of age, because till then "*non potest promereri dotem, neque virum sustinere*"—(i. e.) she can neither earn dower, nor bear a man. But this rule applies only to the age of the wife, *and is confined to the time of her husband's death*. For although the wife when married be under that age, yet if she shall have reached the age of nine years, at the time of her husband's death, she will be entitled to dower.—Roper on Bar. & Feme. 101; Coke Litt. 33.

*But conveyance by husband in conformity with his agreement *by parol*, made before marriage, will bar widow's dower, in the land conveyed—1 B. Monroe, 77, 79; 1 Devereaux, 30; 3 ib. 3. So, conveyance by husband before marriage, tho' unrecorded, at the time of marriage. 23 Pick. 80.

An alien is not entitled to dower.—Coke Litt. 31, 6; 2 Johns. Cases, 29.

In Maryland, an alien widow, who married in the United States, was admitted to dower. 1 Har. & Gill. 280.

In Massachusetts, (stat. 1835) and in New-York, by stat. 1799, an alien widow takes dower.

The widow of a person placed on the confiscation list, is not barred of her dower—I Bay's. repts. 73; 2 Bay. 20. Whether native born widow of an alien is entitled to dower—query? See Judge Maye's opinion.

JUDGE MAYES' OPINION.

Husband is an alien, wife a citizen—he purchases real estate, and dies leaving neither lineal nor collateral relations capable of inheriting. Does it descend to his wife?

It does not.

The question arises under the following provision:

"In case any resident of this state shall die, leaving no lineal or collateral relations, capable of inheriting, but shall leave a widow, such widow shall inherit the whole estate." Howard & Hut. 367.

Escheats result from two causes:

- 1st. Because the tenant cannot hold.
- 2d. Because the tenant who could hold has died, but has left neither lineal nor collateral relations capable of inheriting.

In the first case it results from a defect in the tenant himself. In the second from a defect of heirs. The foregoing provision obviously was intended to supply an heir by giving the inheritance to the widow where the estate would have escheated for defect of heirs, if none but lineal or collateral kindred could inherit, and has no reference to the case in which the tenant could not hold.

To pass an estate by inheritance, two things are necessary:

- 1st. That the tenant be able to transmit by inheritance.
- 2d. That he who claims, be capable of receiving by inheritance.

The statute enables the widow to receive an inheritance under certain circumstances, that is, where the lineals and collaterals are incapable of receiving—putting it on the incapacity of lineals and collaterals—but confers no power on an alien to transmit.

Where an alien purchases, the escheat results from the purchase. Where a citizen dies without lineals or collaterals capable of inheriting, the escheat results from the death.

The statute relates to escheats resulting from the death, and not to those resulting from the purchase. Its language is, if any person die leaving, &c.

Can the widow have dower, or does it descend free from dower? She cannot have dower.

At the common law, a widow could not be endowed of an estate, which could not by legal possibility have descended to a child born of the marriage. To prove that she can have dower, we must prove that if there had been a child of the marriage, such child could have inherited. This cannot be done. A citizen child cannot inherit from an alien father—not for want of capacity in the child to take, but for want of ability in the father to transmit.

The law only gives to the wife dower in an estate which the law renders the husband capable of holding. The law did not enable the alien husband to hold a freehold in land, and it would be contradictory to say the wife by reason of the marriage and death of husband, should have a freehold, when the husband whilst living was never capable of holding. She could not by the marriage with him get an estate greater, or held by a different tenure from his. To give her dower, would be to carve the greater out of the less interest—to carve an indefeasible freehold, out of an estate which could not be held.

3d. Does it escheat subject to his debts?

It does not. His creditors cannot reach it. The statutory provision as to estate escheating subject to debts, only relates to escheats, resulting from death and want of heirs who could take; and has no reference to a case where the escheat arises from the purchase, or incapacity of the tenant to hold.

The tenant whilst living could not have sold the land to pay his debts, and thereby prevent the states enforcing the escheat. The law does not extend the rights of creditors beyond what they would have been if debtor was living, but only protects them from prejudice by his death.

In Missouri, when husband dies leaving children by former wife, a latter wife cannot claim slaves, absolutely which came by her to the marriage, but only *one-third* during her natural life.—Sup. Ct. Decisions, vol. 3, 191.

DOWER—OF WHAT.

§ 7. A widow is entitled to dower in all lands, of which her husband was seized, *at any time*, during coverture—of which her issue might by possibility have inherited—2 Black. Com. 131; Co. Litt. 31; Roper on Bar. & Feme. 139—and of which her husband died seized. I Root, 50.

But not of lands alienated, or mortgaged in fee, before marriage.—2 South. 865.

And she cannot have dower of any interest less than a freehold. 6 Sm. & M.

Nor of any estate *per autre vie*—5 Cowen, 388—nor of lands entered, but not granted—5 Hayw. 278.

§ 8. *Seizin, in law*, is equivalent to seizin in fact—Co. Litt. 36, 53; 22 Pick. 238, 289; 23 ib. 80, 84. The husband must have had a *right* to actual seizin. Legal seizin of a vested remainder is not sufficient—7 Mass. 253; 23 Pick. 80, 84.

If agent takes deed in his own name, it does not entitle widow to dower. 15 Mass. 495.

Actual possession, or receipt of rents, is *prima facie* evidence of seizin—5 Cowen, 299; 7 ib. 353.

M., a revolutionary soldier, died in 1778, leaving an elder brother, named I., his *heir*, who married plaintiff in 1783. In 1786, I. gave a quit-claim deed to one P. of all lands thereafter granted by the state to M. as a gratuity for military services; and subsequently a patent issued to M. of land, including the present premises, in question. I. having died, his widow brought ejectment—*Held*: P. was estopped from denying husband's seizin, and that she should recover—*also*, that by act of 1803, *legal estate* was vested in M., as if patent had issued before his death. 2 Hill, 145. Cowen, J. dissented—heir-at-law was never seized of any beneficial interest, and no dower attached.—*Ibid.* See 5 Hayw. 278.

But seizin *for an instant*, not absolute, but *transitory*, where the same act which conveys the seizin, also divests it, does not

entitle the widow to dower—as, where a mortgage is executed simultaneously with the conveyance to the husband to secure the purchase money—15 Peters, 21; Roper on B. & F. 116; 4 Mass. 566; Cro. Eliz. 503; 7 Halst. 22; 2 Southard, 565—or where the husband has given a mortgage on his land before marriage—2 South. 565; 1 Har. 107; see also to the same effect, Coke Litt. 31; 14 Mass. 351; 4 Maryland Repts. 550; 14 ib. 351; 1 Bay. 312; 15 John. 458; 2 Gill. & John. 318; 4 Leigh, 30; 1 M'Cord's Ch. rep. 358, 279; 3 Paige, 513; 1 Humph. rept. 508; 1 B. Monroe, 259; 1 Cowen, 460.

If there be two mortgages, widow holds subject to the last, if the *first* is paid off—6 Pick. 416.

§ 9. At common law a widow was not dowerable in her husband's equity of redemption; and if a man mortgages in fee before marriage, and dies without redeeming the mortgage, the widow cannot have dower against the mortgagee. 12 Peters, 201; 15 Peters, 21; 7 Greenl. 102.

But the widow may claim dower out of an equity of redemption, till foreclosure of the mortgage—I Cowen, 460; 18 Pick. 299. But she cannot claim dower against any person who having the right to redeem the land, has paid the amount due on the mortgage, until she has contributed her due proportion of the money thus paid, according to her interest. 5 N. Hamp. 25; 7 Greenl. 102.

But where the redemptioner conveyed his equity, to a purchaser who agreed to pay off the mortgage, and also the balance due grantor—which was done—the widow's dower attached.—12 Mass. 227; 1 Connt. 559.

So, if the incumbrance was removed by widow or grantor, or other person for him.—13 Mass. 525; 15 ib. 278; 13 ib. 162, 168; 17 ib. 564; 10 ib. 364.

So, if the equity be sold under an execution, and time for redemption expired—but the mortgage money was finally paid by tenant of mortgagor, who took a release to the mortgagor.—17 Mass. 564.

So, where owner of land made *two* mortgages—wife releasing—and *equity* was sold under execution—Purchaser afterwards

took an assignment of one mortgage, and caused the other to be discharged for his own benefit, but without taking an assignment, and took possession, which continued more than three years after assignment, when husband died—*Held*: the widow of mortgagor having no notice of entry, or condition broken, was entitled to dower subject to *first* mortgage, the other having been extinguished by discharge. 14 Pick. 98; 6 ib. 416.

Where A. sold land, executed a *title bond*, received a portion of the purchase money, and afterwards married—and then conveyed the land to the purchaser and took a mortgage of the premises back, to secure the balance of the purchase money—*Held*: a right of dower, at law, vested in A's wife. 2 Harr. & Gill. 264.

If the mortgage or lien be only for *part* of the purchase money, the wife may claim dower, subject to such incumbrance; and if money should be assessed in lieu of dower, commissioners should, in the first instance, deduct the amount of the incumbrance from the value of the land, and assess dower out of the residue.—1 Hill's S. Car. rept. 200.*

Where the purchaser of an equity of redemption redeems, the widow of mortgagor will be let in, only on contributing her *quota*. But, if such person takes an assignment of the mortgage debt, the widow can redeem only by paying the *whole* mortgage debt. 5 Pick. 146. But she may be endowed of the *surplus* over the mortgage. 4 M'Cord, 346.

As against all except the mortgagee, the widow may claim her dower, and may enforce such claim at law; yet as against the mortgagee, or those claiming under him, her only remedy is by bill in equity, and payment of her proportion of the debt.—3 475; 14 ib. 98; 7 Greenl. 41; 14 Wend. 233.

*Where a testator having mortgaged his real estate, devised it to his son, who died leaving a widow, and the executor sold the equity of redemption, and purchased it himself, and redeemed the mortgage, paying one-half of it with assets in his hands, as executor, as directed in the will, and the other half with his own money, and the heirs and widow of the son elected to affirm the sale—*Held*, the widow was entitled on account of her right of dower, to the interest during her life, on one-third of the sum for which the equity of redemption was sold, and in one-third of the amount paid out of the testator's estate, towards redeeming the mortgage. 14 Pick. 345,

§ 10. A widow is entitled to dower in lands, of which her husband died seized, notwithstanding dower had been previously assigned in the same lands, to the widow of her husband's father. And, on the death of the father's widow, the son's widow becomes entitled to one-third of the portion originally assigned to the former—11 Wendel, 592—otherwise, if the elder tenant in dower release to the tenant in fee. 13 Pick. 382.

§ 11. The widow of tenant in common is only entitled to dower out of the husband's *allotted* portion—13 Mass. 504; 15 Peters, 421. Where A. and B. agreed, by parol, to exchange farms, and in pursuance of such agreement, conveyed to each other their farms, by deeds in common form—*held*, such proceedings were not evidence of an exchange, and that the widow of A. was entitled to be endowed in both farms.—1 New-Hamp. 65. Several parcels of land in possession of the same tenant, and in the same town, are liable to dower.—*Ibid.*—And a widow claiming a *third* of an undivided half of a farm, may recover the same in severalty. 15 Wend. 410.

§ 12. Widow is not dowable of *wild* lands, unless in connection with cultivated farm—15 Mass. 164—nor of land alienated when wild, but become cultivated by labor of alienee—1 Pick. 21—but otherwise, if not alienated, and used in connection with other land.—7 Pick. 143, 144; 23 ib. 88. But in Mississippi the custom is to endow of wild lands.

And where woodland is connected therewith, widow shall have only woods and timber, sufficient for supply of dower estate—to be used thereon, and for purposes connected with its proper enjoyment. 17 Pick. 248.

§ 13. At common law, dower was claimed out of a trust estate, because courts of law only looked to the legal title; but courts of equity would in such case relieve against the right of dower.—2 Ves. 631; 2 Free'n. 43; 3 Mas. 347; 3 Gill. & John. 398; 2 Hill's So. C. Ch. R. 213.

Now, in all the States of the Union, trust estates are not liable to claim of dower by widow of trustee.—2 Hill's So. Carolina Ch. Repts. 213; 3 Hill's N. York Repts. 96—see also 3 Mason's C. C. Repts. 347.

In Mississippi, it is enacted, that "where any person to whose use, or in trust for whose benefit, another is, or shall be seized of lands, tenements or hereditaments, hath or shall have such inheritance in the use or trust, as that if it had been a legal right, the husband or wife of such person would thereof have been entitled to curtesy or dower, such husband and wife shall have and hold, and may by the proper remedy in similar cases, recover curtesy or dower of such lands, tenements or hereditaments." Acts 1822—How. & H. 353.*

And "where a person shall die possessed of lands purchased of the United States, the payment for which has not been completed, such lands shall be subject to the dower of the widow, in the same manner as if the title had been complete at the time of the death of the husband." *Ibid.*

§ 14. At common law, dower was not claimable out of real estate held in joint tenancy. The mere possibility of a joint tenancy prevents dower. If the husband, being joint tenant, convey his interest to another, thus simultaneously part with his interest and destroy the right of survivorship, no dower attached. 15 Peters, 21. But the right of survivorship being now destroyed, dower would, in such case, attach.

Dower may be assigned either separately or collectively with other lands. 1 Cowen, 460.

DOWER---ACCORDING TO WHAT VALUE.

1. *As against the Heirs.*

§ 15. The value of the property at the time of the assignment, shall be the basis upon which dower shall be ascertained—if her husband died seized of the land. 1 Bailey's S. C. R. 227.

Dower is due of iron or other mines, wrought during coverture, but not those unopened at the husband's death. 1 Cowen, 460.†

If the land assigned for dower contain an open mine, the widow may work it for her own benefit. *Ibid.*

*In Kentucky, widow is entitled to dower in her husband's equitable title to estate. 1 B. Monroe, 91.

†The husband died seized of fifty acres—four containing a slate quarry, partially above ground—one-fourth of an acre dug over, by sections of ten to twelve feet square, and so down to usual depth, and then beginning on the surface again—*Held*: widow is dowable of the *whole* quarry. 10 Pick. 460.

And if the heir has improved the land after the husband's death, or it be diminished in value by any act of the *heir*, the widow shall be endowed—in the former case of the improved value, in the latter, of the value before diminution. The reason is, her right of dower was consummated at the death of her husband, and the improvements were *quasi* on her land.---Roper on Bar. & Feme. 140. For feudal reasons, the widow holds dower of the heir or reversioner;—but in point of title, her right is from, and a continuation of that of her husband; and though between husband's death and the assignment of her dower, a seizin of the heir or another person intervened, yet, on assignment of dower, her title relates back to the husband's death. 3 & 4 Dev. & Batt. 448.

2. *As against the Alienee.*

§ 16. As against the alienee of the husband, the value at the time of alienation, is the true criterion, because this is all the alienee can recover from the heir. Rop. on B. & F. 140; 1 Dana, 347; 1 Cowen, 460; 1 Pick. 21.

And dower must in such case, be so assigned as to give the alienee or tenant possession of the improvements, if practicable—I Cowen, 460—if otherwise, it should secure to alienee a suitable allowance for the use of them.---*Ib.* & 9 Mass. 8, 218; 10 ib. 80, 83; 3 ib. 523, 544; 8 Pick. 532, 535; 1 Penrose, 697.

Any increased value from extrinsic causes, (not improvements by the alienee,) must be included in the assessment of dower.—6 Ohio R. 77; 3 Mason's C. C. R. 347.

But a mortgage does not bar dower in the improvements, tho' the wife joined it. 3 Mason's C. C. R. 459.

§ 17. A widow has no right to make turpentine on land assigned to her as dower, which had not been so used in the life-time of her husband. But she may rightfully use in the ordinary mode trees bored, during his life-time, and may box new trees as old ones become unfit for use, so as not to enlarge the crop, beyond the extent it had when dower was assigned. 3 & 4 Dev. & Batt. 179—See also 1 Cowen, 460.

DOWER---HOW ASSIGNED.

§ 18. At common law, a widow was entitled to the dwelling-house of the husband, *forty* days after his death, and to be sup-

ported *de bonis viri*, i. e. out of her husband's goods. This right was called the "widow's quarantine."

Marriage, during forty days, forfeited this quarantine, because the widow had thereby provided for herself. Roper on Bar. & Feme. 133.

In Mississippi—How. & H. 353, sec. 45—"A widow shall retain full possession of the dwelling-house, in which her husband most usually dwelt next before his death; together with the out-houses, offices, or improvements, and plantation thereinto belonging, free from molestation or rent, until dower is assigned.

§ 19. But the widow is not entitled to enter where she pleases, till assignment of dower; and trespass lies against her, (by common law,) if she tarry in the dwelling-house beyond quarantine. 2 Bailey's R. 103; 2 Hayw. 147. In Mississippi, she may tarry till assignment of dower. Sec. 1, *ante*.

In Connecticut, a widow, by her husband's death, becomes tenant in common, and is such till the assignment of dower.—The assignment of dower is not requisite to her right of entry. 5 Connt. 462.

And though a widow cannot *enter* before allotment of dower, yet if legally in possession, she may retain against ejectment—1 Halst. 367. And where land is assigned, with the widow's consent, and that of the heir, the title commences to be made absolute by report of commissioners when accepted, and in the mean time she may enter and cut growing crops sown by the heir, before assignment. 17 Pick. 236.

§ 20. The heir must assign dower to the widow—Rop. on Bar. & Feme. 138—or the *terre*-tenant, or sheriff. An infant must, and may assign it by guardian. 1 Pick, 314.

The assignment of dower by the sheriff, is most beneficial to the widow. For if she *accept* an assignment of dower, against common right, she will be liable to incumbrances charged on the land by the husband during coverture. Coke Litt. 32, b. 34; 19 Edward 3d, 154.

Thus if the heir assign dower, and the widow accept one of three acres, which is subject to rent granted by husband during marriage, the assignment is good and binding, and in this case

two parts of the widow's acre would have been subject to the distress of the grantee. Perkins, sec. 330; Roper on Bar. & Feme. 137.

Where some of the heirs are minors, those who are of age may assign dower by deed setting out the metes and bounds. 2 South. 865; ib. 321.*

§ 21. If the heir, while a minor, assign too much, on attaining twenty-one—or in case of his death before that age, then his heir,—on attaining the age of twenty-one years, may have a writ of admeasurement of dower. This writ is only applicable to excess of *quantity*, and if the widow has improved, so as to increase the value, or if of more value from open mines, this writ does not lie, for the heir. And if the heir assign too much, his heir cannot have this writ, because bound by his acts. Rop. on B. & F. citing various authorities, p. 142.

An infant heir, after reaching the age of 21 years, cannot *enter* and thereby defeat dower, as the claim for excess reaches only the surplus, which can be ascertained only by admeasurement.—*Ibid.*

If the widow brought her writ of dower, the heir shall not have his writ of admeasurement, for it is presumed the court took care of his interest; but if the sheriff assigned an excess, the heir may have a *scire facias*. *Ibid.* 145.

§ 22. In Mississippi, it is provided that, "On petition of a widow, to the Judge of the Court of Probates, of the county where her husband usually dwelt, next before his death, setting forth the nature of her claim, and particularly specifying the lands, tenements and hereditaments of which she claims dower, and praying that her dower may be allotted—the court, thereupon, shall issue a writ, directed to the sheriff, commanding him to summon *five* discreet freeholders as commissioners, connected with the parties neither by affinity or consanguinity, and entirely disinterested—who, upon oath, (which oath the sheriff is hereby

*Assignment of dower may be without instrument in writing—1 Pick. 189, 314; 23 ib. 88. If by parol, it will bind the owner, as against her—23 ib. 30. Record of assignment in Probate court, is evidence that it was made, on the widow's application. 10 Pick. 359.

authorised to administer,) shall allot and set off, by metes and bounds, to the said widow, *one-half* in case there be no child or children, or descendants of them; and in case there be a child or children, or descendants of them, *one-third* part, according to *quantity* and quality of *all* the lands, tenements and hereditaments in said county, of which the husband died seized and possessed, or had before conveyed, whereof the said widow had not relinquished her right of dower, according to law, and shall put her in possession of the same—which possession shall vest in her an estate for her natural life. And where she has claims to dower in lands lying in different counties, she may proceed in the Probate court of the county where such lands lie, and make recovery in manner as is herein directed. And the sheriff and commissioners shall also, at the same time, allot and set off to such widow her portion of the personal estate of which her husband died possessed, and to which, by this act, she is entitled; which part and portion shall be and enure to such widow, her heirs, executors, administrators and assigns, forever.” Chap. 34, sec. 43—How. & H. p. 352.

“The proceedings upon such petitions for dower, shall be in a summary way; and the court shall at the *first* term when such petition is filed, proceed to hear and determine the same, and make such order and decree in the premises as shall be just and equitable, according to the rights of the petitioner, and others interested in the distribution of the estate of the testator or intestate—*Provided*, that the party petitioning for dower shall give ten days notice to the executor or administrator, by serving him with a copy of said petition. And where there is no executor or administrator, or where the widow shall be the executrix or administratrix, then she shall give the said notice by advertisement in one of the newspapers published in this State, nearest to the residence of such widow, to be published four times in succession. How. & H. sec. 44, p. 352.

§ 23. The jurisdiction of the Court of Probates, by an express provision of the Constitution, extends to the *subject* of dower; and it is immaterial by what party the widow's claim is opposed.—The court can decree dower against all the world.

§ 24. Dower must be by metes and bounds, if divisible. If dower be divisible, and sheriff does not return seizin by metes and bounds, it is void, unless sufficiently certain, what is assigned, or unless he assign one manor certain in lieu of dower in another manor. Coke Litt. 34; Roper, 137; 1 Penrose, 709.

If the sheriff abuse the trust, and commit fraud or oppression by illusory or malicious assignment, or refusing to assign by metes and bounds, the court will imprison him. Roper, 137; Palm. 265; Keb. 743.

§ 25. In bill or proceeding for dower against the purchaser, the dower must be laid off by metes and bounds in some part of the land, not improved by the purchaser, if this can be conveniently done; and if not, then to be assigned out of the whole according to the value thereof, at the time it was alienated. 4 Wash. C. C. R. 305.*

§ 26. If the property be indivisible in its nature, then *impotentia excusat legem*.—Litt. sec. 44. And, in such case, a proportion of the profits, or the separate alternate enjoyment of the whole, for short proportionate periods, may be assigned for dower. 1 Cowen, 460; 2 Hill's (N. Y.) R. 543.

Where the subject was a village lot, and the assignment was made so as to give the widow particular rooms, with the right to stairway, &c. so as to afford ingress and egress for the enjoyment of the rooms, the tenant cannot object, though, it seems, the widow can. 2 Hill, 543.

(Whether rent of land can be assigned by commissioners to widow---query.) *Ib.*

Of a mill, widow may have third toll dish—or of profits though uncertain, one-third—Co. Litt. 32. So, one-third of stallage, of a fair, of an office, of the keeping of a park, of a dove-house, of a piscary, of courts, and of the third sheaf of tithe of corn.—Coke Litt. 32, a.; Brownlow, 126; Gilbert, (Dower) 371.

*Dower being assigned in the southerly half of dwelling, with certain easements in the north half, and other privileges—the widow as administratrix of her husband subsequently sold the north half, describing the same as said dwelling-house, &c., not assigned to her as dower—*Held*, on her death the easements remained attached to the estate in the hands of the heirs. 21 Pick. 278.

In all cases assignment must be made, the law not allowing the same person to elect and divide. Dyer, 343—Coke Litt. 34—b.

§ 27. Assignment must be made of land subject to dower, or of a rent, or some other profit, issuing out of the same—as, of so many bushels of wheat annually. Whence, it follows, that assignment of leasehold lands in satisfaction of dower, or of rent, granted out of such land, is not a good legal assignment, and no bar to the widow's demand of dower. But if grant of rent be by deed, the deed is an *estoppel*, and the widow will be bound by grant of assignment. Coke Litt. 34; Dyer, 91.

And rent, granted out of a boarding-house, of which the widow is dowable, in lieu of dower, is a good assignment. Perk. sect. 405.

§ 28. The assignment must be absolute, and therefore a condition annexed is void, and the widow may recover. Roper on B. & F. 139.*

Where commissioners for measurement of dower, assess a sum of money to be paid in lieu of dower, they must return the appraised value of the land, as well as the sum assessed, that the court may know the basis of their assignment.—1 Bailey's R. 227. And, it must be of the *entire* value, as well as the sum assessed in lieu of dower. But, if the commissioners have been on the land and appraised it, they may be permitted to amend the return, so as to exhibit the entire value. *Ib.* 343.

The rule is, to assess the *sixth* of the value of the entire fee, as equivalent to widow's estate for life, in *one-third* of the land.—And, as a general rule, the same proportion should always be adopted in assigning dower, except in the case of extreme youth on the one hand, or age or infirmity on the other. *Ib.* 227.

*Under act of 1784, the jury cannot assign the whole of the real estate, on the ground, that *all* is necessary to subsistence. The act gives her one-third of the estate of which her husband died seized, comprehending mansion-house and offices—or if this cannot be done without injustice to the children, then such part or portion as may be sufficient to afford her a decent subsistence. The mansion-house, &c. is not in addition to, but *part* of her *third*, and if the whole be allotted by the jury, when the husband had no other realty, the report will be set aside. 4 Dev. & Batt. 501.

§ 29. Where the heir, administrator, and widow, agreed to sell slaves of intestate and divide the proceeds, the widow is entitled not merely to the use, for life, of the proportion of the money, (giving bond with security for repayment to heirs, at her death,) but to so much absolutely as her life-estate in the said slaves may be worth, having reference to their productiveness by hire, &c. 1 Yerger, 96.

§ 30. In the assignment of dower, commissioners must regard rents and profits only of the estate, of which dower is assigned, and to set off to the widow such part as will yield her *one-third* of the income ascertained, in parcels best calculated for convenience of herself and heirs. 4 Mass. 533; 12 ib. 454; 15 ib. 164, 167.

Dower must be assigned out of the whole inheritance, and not in piece-meal, according to the various rights of the person inheriting the estate. 1 Pen. (N. J.) 281.

The widow is not entitled to an action of assumpsit for use and occupation by tenant from year to year, for rents accruing after the death of the husband and before the assignment of dower, though no damages were given to her, when dower was assigned. 10 Yerger, 472.

Nor will equity, after assignment of dower on petition at law, entertain a bill for the *mesne* profits, during the detention of the dower—unless some equitable circumstances exist, as loss or destruction of title-deeds, or a discovery be necessary. 1 Murph. 128.

Damages for detention must be prayed for, when dower is assigned—*Ibid.*—and if not given, they cannot be afterwards recovered.—*Ibid.*

In proceeding by petition, dower having been assigned, the suit is at an end. Any proceeding to set aside the inquisition, as *scire facias*, writ of error, or of admeasurement, or bill in equity—is in the nature of a new suit. 4 Dev. & Batt. 501.

§ 31. The widow does not require assistance of the heir, but brings her action against any person who has the freehold, whether heir or any other person. She may sue disseizor, abator, intruder; and hence these persons, though holding the freehold by wrong, may assign her dower, and thereby bind those who have the right—3 and 4 Dev. & Batt. 448; 12 Mass. 485—though a paramount dormant title be in a third person. 16 Mass. 53.

Where dower is claimed of one as tenant in possession, it is a good plea in bar that he is not in possession. 1 Mass. 469.

If a separate and distinct action be brought for damages, it must be brought against the tenant of the freehold, and not tenant from year to year. 10 Yerger, 493.

Widow may pray by writ of dower that damages be assessed, and the court will order an issue to be made up between the heir and widow, and submitted to a jury---2 Murph. 79---and if right of dower is denied, in Tennessee, (under act of 1784, authorizing widow to petition the Circuit court,) a jury must be empannelled. 10 Yerger, 493. If the right of dower is not disputed, a writ of enquiry is proper.—*Ibid.*

§ 32. A widow may be endowed of lands conveyed away by her husband in *fraud* of her right of dower, and may recover damages for detention thereof. 1 Humph. 1.

If the deed be only *voidable*, no dower will attach, because there was no seizin at his death;—but if deed was *void*, then *seizin* remained in him, and dower will attach. 3 & 4 Dev. & Batt. 449.

But mere want of consideration will not make fraudulent a conveyance to children, as to wife, without an *intention to defraud* her. 1 Humph. 459.

A husband conveyed real estate to his children, and put it in the hands of third person for delivery at his death—*held*: such deed was effectual from time of its delivery, and not void or fraudulent, as against the widow. 5 Connt. 317.

A deed executed in trust by husband, to secure usurious interest, is void as against widow's claim of dower; and she is not bound to await the action of the heirs, as against one holding adversely under the deed. 4 Dev. & Batt. 442.

Probate courts cannot adjudicate conflicting rights to land, in proceedings by petition for dower, but will leave the parties to their appropriate legal remedies. 3 How. 205; 1 Sm. & M. 527, cited Jan'y. term, 1846, in case of Hayslip's adm'r. vs. P. Noland; 6 Sm. & M.

§ 33. One claiming under husband, is *estopped* from denying husband's claim against widow's claim of dower, and cannot for that purpose set up conveyances from third persons subsequent

to commencement of suit and plea thereto. 4 Dev. & Batt. 442; 3 Harr. (N.J.) 437, 452; 2 South. 285, 265; 2 Green. 125; 3 How. 360.

Where both claim under the same person's title, it cannot be disputed, unless one show a better title. 4 Dev. & Batt. 449.

§ 34. In an action for dower where issues are joined on the demandant's *marriage*, and on her husband's seizin, the tenant cannot avail himself of any improvements made by him, since the husband's alienation. 10 Mass. 80.

And where, to a writ of dower, the defendant being a purchaser, pleaded that he could not deny the demandant's right, but had made improvements, and had assigned to the demandant *one full third* of the premises, as they were at the date of the alienation—*Held*: on demurrer, plea was bad, as a plea in bar, and must be construed as admitting dower in the premises, without the improvements.* 8 Pick. 532.

Where right of dower is alleged and not denied in the pleadings, the demandant need not prove it. 10 Mass. 80.

In case of a petition for dower, the defendant need not answer on oath, but may plead his defence. 2 Hayw. 146.

Non-age of the heir is no bar to an action of dower. Roper on B. & F. 146, 150.

§ 35. A right of way over the husband's lands, is appurtenant to dower, and expires with it. 15 Mass. 130.

§ 36. In the demand of dower, the description will be sufficient, if it gives notice to the tenant, what land the demand refers to.—22 Pick. 283. If the land may be known by description, it is not necessary to set forth metes and bounds. *Ibid.* 283, 287; 10 Mass. 80.

But the description must be so certain, as that seizin may be delivered by the sheriff, without reference to any description *dehors* the writ; and no defect can be cured by reference to any

*In proceedings for dower, the tenant who derives his right from the husband, cannot deny his seizin. 3 How. 360.

The statute assigning dower regards the children of the former marriage in determining the extent to which the wife of the second marriage is dowable in the property of the husband. 2 How. 692.

existing conveyance. 22 Pick. 283; 23 ib. 80—See statute, sec. 22, ante. p. 383.

§ 37. The order of the court appointing commissioners to assign dower and divide lands, must be upon notice to all persons interested—otherwise it is voidable. *Holderman vs. Holderman's heirs*, B. Monroe's R. 385.

How the present value in money is to be ascertained, see *Davis vs. Logan's heirs*, 342.

(The finding of an annual value, where the husband did not die seized, is illegal, nor can the demandant in such case recover costs.—By stat. of Merton, 2 Henry III. ch. 1; 6 Edward I. ch. 1; 2 Saund. 44, e. [45] note.) See also on this subject, 3 Yeates, 38; 4 Dallas, 212; 5 Sergt. & Rawle, 289; 15 ib. 72; 17 ib. 297, and 3 Penrose & Watts, 454.

§ 38. It is only where the husband died seized of the land, that damages and costs can be assessed against the defendant, or any judgment for money can be given. 3 Pennsylvania R. 454; 3 Harr. 158.

Where the husband died seized, in dower *unde nihil habet*, the plaintiff may recover the whole amount of damages, from the defendant in possession, though there may have been several tenants of the freehold since the death of the husband, and the tenant may have been only a short time in possession.—7 Watts, 533. It is not necessary in dower, under *nihil habet*, that the defendant be tenant in fee. A tenancy of the freehold is sufficient. *Ibid.*

§ 39. At common law, no damages were allowed on judgment for dower.—10 Ohio R. 18; 2 Bailey, 243. Whether entitled to rents and profits, damages and costs, and from what time—query? 4 Wash. C. C. R. 305.

And the heir on whom the duty rests to assign dower, may now by plea of *tout temps prist*, avoid damages—Roper on B. & F. 143—*Provided*, the heir has *offered* to assign *immediately* after the death of the ancestor, and the widow has refused to accept. *Ibid.* 145, 146.

In Ohio, no damages on petition for dower allowed.—10 Ohio R. 18.

The rents which accrue prior to the assignment belong to the heir. But he is answerable to the widow for them, as damages for not assigning dower. 2 Murph. 79.

Damages are measured in actions of dower by the annual value of the land, and may be assessed by the court, with the demandant's assent. 6 Mass. 498-9.

They are recoverable from the time of the demand made on him who is the tenant of the freehold at the time of such demand. 13 Pick. 382; 1 Dev. & Batt. 213.

§ 40. Interest will not be allowed, in a court of law, on a sum of money assessed in lieu of dower, where the husband died seized. The acts of 1824-25, (in S. Carolina,) giving interest on the assessment, are confined to cases where the husband aliened during coverture. 1 Bailey's S. Car. R. 229; 2 ib. 343.

The widow is entitled to interest on *mesne profits*, up to the time of assigning dower. 2 Hill's S. Car. R. 429.

§ 41. On recovery in dower, demandant is entitled to have her costs. 1 *Ib.* 140.*

DOWER—HOW BARRED.

§ 42. In the English law, the wife's remedy by action for her dower is not within the statute of limitation. Dyer. 224, a.; 1 Shep. Touch. 28, 32; 9 Ves. 222. The 3d and 4th William IV. made the action of dower, or suit for rents and profits of dowerable land, subject to the statute of limitations. The rule varies in the different United States.

In South-Carolina, time is a bar---3 Dess. Ch. R. 555---So, in Mississippi---1 Sm. & M. Ch. R. 494.

In New-Hampshire and Maryland, time does not bar dower---1 N. H. Cas. 107; 2 Gill. & John. 468.

In New-York, the English rule prevailed till changed by statute. 6 John. 197.

*The commissioners should ascertain whether the husband died seized of the lands or not, and if so, "of what estate, the time of his death, the annual worth or value of the land in *all* issues, according to their true value"—to assess the damages of the demandant on account of the detention of her dower over and above the value, as also over and above her costs. 3 Chitty's pl. 603, *et seq.*; 2 Saunders, 331; *ib.* 44, e. (45) note; Coke Litt. 33. If they merely find he is seized, and not the rest, a writ of enquiry may be awarded to supply the omission—2 Saund. 44—and with it a writ of seisin.—*Ibid.*

In Ohio, the act of limitations of 1810, operates bar of dower after 21 years, and equity will refuse its aid, after that time, aside from the statute. 10 Ohio R. 24.

Where the widow is beyond seas, and so within the saving clause, equity will not allow the staleness of her claim to be set up, in bar of her dower. *Ibid.* 498.

§ 43. At common law, dower will be defeated by the determination of the estate, or avoidance of the title of the husband, by entry for a condition broken, or by reason of a defective title. So, dower will be defeated by the operation of collateral limitations, when the limitation happens. 3 Preston on Abst. 373; Butler's note, 170, to Coke Litt. 241, a.

As a general rule, the wife's dower is liable to be defeated by every subsisting claim or incumbrance, in law or equity, which existed before the inception of the title, and which would have defeated the husband's seizin. 4 Kent's Com. 50.

If evicted by paramount title, the widow will be entitled to be endowed anew, in the other lands of her husband. 13 Mass. 162, 168.

§ 44. The widow may be barred by elopement---1 Bailey's S. Car. R. 312---divorce, being an alien*---and also by detaining the title deeds or evidences of the estate from the heir, until she restores them. Co. Litt. 39; Roper on B. & F. 150.

If the husband and wife levy a fine, or suffer a common recovery, she is barred. 10 Co. 49, b.—Plowd. 504—(see "Relinquishment," *post.*)

So, if the wife leave her husband by compulsion and refuse to return, on his offer to take her back, and afterwards lives in adultery.—1 Bailey's So. Car. R. 312. But see 3 Hill's New-York R. 95.

A decree of divorce in Kentucky, is no bar to dower of lands in Ohio. 10 Ohio, 27.

By the law of Kentucky, a divorce obtained in that State does not protect the offending party from the penalties of bigamy, if he or she afterwards marry. Where plaintiff, married in Kentucky, and was there divorced, (she being the offending party,)

*See ante. pages 373, 374, sections 5 and 6.

and moved to Tennessee, and there married—*Held*: she was entitled to lands her husband died seized of. 1 Yerg. 110.

§ 45. The wife may be barred by having a jointure in lieu of dower. Co. Litt. 36, b.

A jointure is a competent livelihood of the freehold to the wife, of lands and tenements, to take effect in profit or possession, presently after the husband's death, for the life of the wife at least.—Roper on Bar. & Feme. 155, 8.

Such jointure must be to herself, and not to a trustee—3 P. Wms. 269; 3 Plowd. 277; 13 Ves. 443—otherwise it is no bar—*Ib.* It must be of a freehold in the lands, for the life of the wife. 7 Mass. 153.

This rule of law, founded on 27 Henry VIII. is much softened by the courts of Equity, which enforces such equitable settlement as an equitable bar. 1 Atk. 562, 563; Bacon's Abr. Tit. Jointure, B. 5.

And jointure on an *infant*, before coverture, is a bar to dower, notwithstanding her infancy. 2 Paige, 511—and see 5 Bro. P. C. 570; 4 Bto. Ch. R. 506.

Covenant of wife, in marriage contract before marriage, not to claim dower, is no bar—7 Mass. 153; 15 *ib.* 110, 116—And a provision for the wife in such settlement is no bar of dower.—*Ibid.* And her covenant, in consideration of any provision not to claim, is no bar, if the consideration fail. 15 *ib.* 106.

§ 46. It is also settled, that a collateral satisfaction consisting of money or other chattel interest, given by will and accepted by the wife after her husband's death, will constitute an equitable bar of dower. But it must be declared, in express terms, to be given in lieu of dower—2 Ves. 572; 3 Ves. 249; 1 Dall. 415; 3 John. 448; 7 Cowen, 287; 1 Yeates, 424; 1 Greenl. 150; 1 Jac. 503; 2 Hill's Ch. 48; 8 Paige, 325—or by clear implication. *Ib.*

The testator left his wife a provision in lieu and bar of all claim of dower, inheritance, or any other claim, on her part—*held*, that the widow was not excluded from a distributive share of real property, purchased by the testator, after making the will, and as to which he died intestate. 2 M'Cord's Ch. R. 382.

Devise to widow, in lieu of dower, accepted by her, is a good bar, That it was *intended* so, may be inferred from the provisions of the will, as if inconsistent with the claim of dower. But incongruity must be *plain*, and if husband devised dwelling and part of his gardens *durante viduitate*, with certain personal property, &c., and then devised his farm to his two sons, and wife accepted, held *no bar*.—7 Cowen, 287. Where no intention is expressed, or plainly inferrible, that legacy is to be in lieu of dower—unless widow seasonably elect to waive the provision, she will not, (under statute 1783,) be entitled to dower. 12 Pick. 146.

§ 47. The widow shall elect, and not take both as dowry under the will. 3 Ves. 252; 1 Cox, 447; 1 Ves. 230; 2 Freem. 241; 4 Monroe, 265; 7 Cranch. 370; 1 Sim. & Stu. 513; 3 Russ. 192; Amb. 682; Jac. 503.

Her election may be inferred from receiving and enjoying the property devised. 2 Dick. 467; 17 Ves. 277; 1 Edwd. 435; 7 Dana, 6.

In some cases a widow has been allowed to retract from an election made prematurely, the condition of the estate not having been then known. 2 M'Cord's Ch. R. 280.

A widow is not compelled to accept before the estate is settled; and if the will allows her an annuity until such settlement, it is no objection to the payment of the annuity that she has not elected. *Ibid.*

Where testator devised to his wife a certain part of his house, and personalty during her life, without declaring whether the same was in lieu of or in addition to dower—and after his death the widow accepted and enjoyed the estate devised, though less beneficial than dower, fourteen years, and then demanded dower—*Held*: she could not then waive and claim dower. 12 Pick. 146.

Where testator bequeathed to his wife personal property more valuable than the whole of his real estate, on condition of her relinquishing dower, and the wife died in seven days after the husband's death, without waiving the provision in the will, or claiming dower—*held*, that no unreasonable time had elapsed,

within which she could make her election. and her right under the will was not defeated. 10 Pick. 507.

In such case, the will being obviously more advantageous than dower, the presumption is, the wife would have elected the former. *Ibid.*

Where testator devised to his wife during widowhood all his property subject to legacies and debts, and appointed her his executrix, with full authority to sell his real estate, during her widowhood, for payment of his debts, and for her benefit and that of her children; and she accepted, and within *two* years sold part of the realty, under the authority of the will, and soon after married again; and after the second marriage she sold the residue of the real estate for the payment of debts, under a license of court, and with her husband executed deeds thereof without reservation of her right of dower, and being under no misapprehension of the condition of the estate; and sixteen years after her first husband's death, she claimed dower in the land thus sold, under the license—*Held*, that she had accepted the provision in the will, and was barred of dower. 1 Metcalf, 57—see 3 Ohio R. 12.

DOWER----HOW BARRED OR PREVENTED.

§ 48. In general, a testamentary provision by the husband, in favor of the wife, either in land or money—if he say nothing about dower—will not compel the widow to elect; the presumption being, that the provision was intended for a gratuity. 5 Hill's R. 206, (N. York.) See sec. 50.

Otherwise, if a contrary intention be manifested by express words, or if the frame of the will be such that the wife cannot receive both the testamentary provision and her dower, without breaking up the testator's plan of disposing of his estate. 5 Hill, 206, (N. Y.)

Upon the foregoing distinction, it was *held*, that where testator devised all his real and personal estate to his wife, "during her life, or so long as she should remain his widow, with remainder to his children;" and after his death the widow entered and occupied, under the will, for several years, and then married a second husband, she was entitled to dower. *Ibid.*

The husband being joint tenant, an action for partition became necessary; and widow, as devisee, must demand it. *In doing this, she no more waived her own dower, than, (if it had been subject to the dower of any other person,) the latter would have been defeated.* The devisee claimed and held the moiety allotted to her, as devisee, subject to her claim for dower; and she is not estopped by her demand from claiming dower in the *other* half from the tenant. 1 Dallas, 419.

§ 49. Equity will interpose against the wife's claim for dower in the following case—1st. Where the implication that she shall not have both the devise and the dower, is strong and necessary—2d. Where the devise is entirely inconsistent with the claim of dower—3d. Where it would prevent the *whole will* from taking effect, i. e. where the claim of dower would overturn the whole will *in toto*.—2 Dall. 418; 2 Yeates, 389; 3 ib. 10; Add. 351; 1 Yeates, 424.

Where one bequeathed a wife certain articles of furniture and stock, "together with the interest of one-third of the price of his real estate when sold"—it was ruled, that the bequest being absolutely inconsistent with and repugnant to, the claim of dower, the widow should be put to her election. 2 Yeates, 302, 389, 79.

Where one devised to his wife sundry specific articles, and also "\$200, to be paid to her *one year after the sale of his real estate,*" and directed that his wife and children should live together on his real estate and equally enjoy the profits thereof, until his sons should come to the age of twenty-one years, when he directed it to be sold and the proceeds given to his youngest sons, &c.—*Held:* there was no such repugnancy in this devise, as to bar the widow's claim of dower. 2 Yeates, 433; see also 1 Binn. 566; 3 Yeates, 10.

§ 50. In Mississippi, much of the perplexity growing out of the question, whether a devise is intended to be in lieu of dower, is removed by establishing a rule directly opposite to that just considered, and under the operation of which every devise to a wife is so considered, unless otherwise declared.—The words of the statute are—"Every devise of land, or any estate therein, or bequest of

personal estate, to the wife of the testator, shall be construed to be in bar of her *dower in lands*, or *share of the personal estate*, respectively, unless it be otherwise expressed in the will." Act 1821, How. & H. 350.

§ 51. It is further enacted, that "a widow shall be barred of her right of dower in land or share of the personal estate, by any such devise or bequest, unless within six months after the authentication or probate of the will, she shall deliver or transmit to the court where such authentication or probate hath been, a written renunciation in the following form—"I, A. B. widow of —, late of —, deceased, do hereby renounce and quit all claim to any bequest or devise, made to me by the last will of my husband, exhibited and proved according to law—and I elect to take, in lieu thereof, my dower, or legal share of the estate of my said husband, A. B." But by renouncing all claim to a devise or bequest, or devises or bequests, of personal property, made to her by the will of her husband, she shall be entitled to the legal share of the personal estate of her husband, which shall remain after payment of his just debts and claims against him, and no more." Acts 1821, How. & H. 360.

And again—"If the will of the husband devised a part of both real and personal estate, she shall renounce the whole, or be otherwise barred of her right, of both real and personal estate."—*Ibid.* 351.

But, it is further provided, "that if the will devise only a part of the *real* estate, the devise shall bar her of only the real or personal estate, as the case may be—*Provided*, nevertheless, that if the devise of either real or personal estate, or of both, shall be expressly in lieu of her legal share in one, or both, she shall accordingly be barred, unless she renounce as aforesaid. But, if in effect, nothing shall pass by such devise, she shall not be thereby barred, whether she shall or shall not renounce as aforesaid—it being the intent of this act, and consonant to justice, that a widow accepting or abiding by a devise, in lieu of her legal right, shall be considered as a purchaser, with a fair consideration." Acts 1821—How. & H. 351—Sec. 45.

And further—"When any person shall die intestate, or shall make his last will and testament, and not make therein any ex-

press provision for his wife, by giving and devising unto her such part and parcel of his real and personal estate as shall be fully satisfactory to her, such widow may signify her dissent thereto, in the Probate court of the county, wherein such last will and testament is proved and recorded, at any time within six months after the probate of such will; and then and in that case she shall be entitled to dower in the following manner, to wit:

1st. One *third part* of all the lands, tenements and hereditaments, of which her husband died seized and possessed, or had before conveyed, whereof said widow had not relinquished her right of dower, as provided for by law; which said third part shall be and enure to her proper use, benefit and behoof, for and during the term of her natural life;—in which said third part shall be comprehended the dwelling-house in which her husband shall have been accustomed most generally to dwell, next before his death, together with the offices, out-houses, buildings, and other improvements thereunto belonging or appertaining. But—

2d. If there be no child or children of such testator or intestate, nor descendants of them, then the widow shall have as her dower, one half of the real estate, as aforesaid, for and during the term of her natural life—*Provided*, that if it shall appear to the Probate court to which application is made, that the whole of said dwelling-house, out-houses, buildings and other improvements thereunto appertaining, cannot be applied to the use of the widow, without manifest injustice to the children or other heirs—then and in that case, such widow shall be entitled to such part only of such buildings and other improvements, as the court may deem reasonable and just.” Act 1822, How. & H. 351.

DOWER—HOW RELINQUISHED.

§ 52. No estate of a feme covert, shall pass without previous acknowledgment, on private examination of her, apart from her husband, before a Judge of the Supreme Court, Justice of the Peace, (or county court, now obsolete,) authorised by this act to take such acknowledgment, that “she signed, sealed and delivered the same as her voluntary act and deed, fully without any fear thereat, or compulsion, of her husband,” of which a certificate must be written on or under the deed, and signed by the officer making it. How. & H. 345, 347.

If a feme covert reside abroad in the United States, her acknowledgment may be taken before the Chief Justice of the United States, an Associate Judge, or District Judge of the United States Court—or any Judge or Justice of the Supreme Court, or the Superior Court of any State or Territory in the Union. If in a foreign kingdom, then before any court of law, mayor or other chief magistrate of any city, borough or corporation, of the said foreign kingdom, state, nation or colony, in which said party resides, (or in which the witnesses reside,) certified by said officer, &c. Sects. 13, 14, 15, How. & H. 346.

And by act of 1844, it is further provided, as follows—"That when any person, who shall have executed, or may hereafter execute, any deed or conveyance of lands, tenements, or hereditaments, lying and being in this State, or the witness or witnesses thereto, or any female entitled to dower, or other estate, in any lands, tenements or hereditaments, lying and being in this State, shall be absent from or reside not in this State, but in some other State or Territory in the United States, then, the acknowledgment or proof, or in case of said females, the examination and acknowledgment of such deed or conveyance, may be taken and made before, and certified by the judge of any inferior or county court of record, or any justice of the peace of this State or territory and county wherein such person, witness or witnesses, or females, may then be or reside; and shall be authenticated, by the certificate of the clerk or register of the superior, county, or circuit court of such county, with a seal of his office thereto affixed, or if made or taken before and certified by a justice of the peace, shall be authenticated by the certificate of either the clerk or register aforesaid, or of the clerk or register of said inferior or county court of record of such county, with the seal of his office thereto affixed; and when so made or taken, certified and authenticated as aforesaid, the same shall be as good, valid, and effectual, as if it had been made or taken before and certified by the chief justice of the United States, or an associate justice of the supreme court of the United States, or any district judge of the same, or any judge or justice of the supreme or superior courts of any State or territory in the United States, as is provided in the thirteenth and fifteenth sections, to which this is an amendment of an act, entitled

"an act concerning conveyances," passed June 13th, 1822—or any judge of the High court of Errors and Appeals, judge of the circuit court, judge of probate, notary public, or clerk of any court of record in this State, and shall be entitled and admitted to record in the proper office of record, in the county wherein the said lands, tenements or hereditaments, may be situated and lie.

"A *feme covert* may convey her estate, whether in fee, or of dower, or otherwise, in any lands, tenements, or hereditaments, lying and being in this State, by her deed, acknowledged and certified according to the provisions of the 19th section of the act to which this is an amendment; or may by power of attorney executed by her, together with her husband, acknowledged and certified, according to the provisions of said section, authorise and empower any agent or agents, to sell and convey the interest and estate of the said husband and wife, (whether the estate of such wife be in fee or of dower, or otherwise,) of, in, and to any lands, tenements, or hereditaments, lying and being in this State, and the title of the vendee under such sale and conveyance, shall be as valid, as if directly made by the deed of said husband and wife, acknowledged and certified as aforesaid."

§ 53. The certificate of the acknowledgment of a *feme covert*, of a deed conveying her interest in land under act of 1790, (in Pennsylvania,) must state substantially, that she was separately examined, that she knew the nature and consequences of the act she was about to perform, and that her will in the performance of the act was free;—therefore, a certificate stating only that she was of full age and separately and apart examined, and contents made known to her, without mentioning her *voluntary* consent to the execution of it—is insufficient. 4 S. & R. 472. The relinquishment must be made separate and apart from her husband. 1 Black. 381. The deed must be acknowledged agreeably to the act. 3 Har. (N. J.) 452.

The following certificate of acknowledgment by husband and wife, was held sufficient to bar dower under act of February, 1805, (in Ohio)—"Before the undersigned, within and for said county, personally appeared B. D. and C. D. his wife, who being made acquainted with the contents, and being examined separate and apart, the wife from her husband, acknowledged the above in-

denture to be their act and deed, for the uses and purposes therein mentioned. 3 Ohio R. 140.

To bar the widow, by deed executed under the act of 1805, it is necessary that the certificate of acknowledgment should show that the wife was acquainted with all its contents. 6 Ohio R. 358.

A certificate of the acknowledgment of a deed by a married woman, for the conveyance of her land, should exhibit *on the face of it*, at least a *substantial* compliance with the provisions of the act of 1770. Therefore, if the certificate state, that the wife personally appeared before the magistrate, acknowledged the indentures to be their act and deed, and desired the same to be recorded, *they being of full age*, and by him *examined apart*, it is insufficient. 6 S. & R. 49 & 143; 14 S. & R. 84.*

§ 54. The dower of a feme covert cannot be barred by her final execution of a deed, in which she is not named as a party. 7 Ohio R. 195.

And courts will not construe words in a conveyance renouncing *dower* according to the act, to mean *inheritance*;—the formalities to release inheritance by a feme covert must be complied with. 2 M'Cord's (S. Car.) Ch. R. 141. (In Mississippi the formalities are the same in both cases.)

A wife may join her husband in a deed expressly relinquishing dower, in the premises conveyed, or by her separate subsequent deed, in which his sale is recited, as the consideration of her relinquishment. 7 Mass. 14; 9 ib. 161, 173; ib. 143, 149.—And if wife join in a deed with her husband in token of relinquishing her dower, but without words of grant, she is *estopped* from claiming dower, though the husband had previously sold the premises, or they have been taken in execution. 8 Pick. 532. But not unless the deed contains words expressing or implying an intention to release her dower in the lands conveyed.—9 Mass.

*An acknowledgment of a deed by husband and wife, in Washington county, Maryland, where they resided, before A. B. and C. D.—who were stated in a certificate, from the clerk of the court of the county, under his official seal, to be justices of the peace of that county, without stating they were the *chief officers* of the place, or any proof that they were so, is not good within the act of 1770.—8 S. & R. 268.

218; 13 ib. 223; ib. 382. Nor where she duly joins and afterwards grantee recovers judgment and satisfaction against him for breach of covenant of seizin, or of a right to sell—9 Mass. 143—Nor where she has joined in a mortgage, and the husband's administrator has discharged it, although before such mortgage the Judge of Probate, by reason of her release, had made her an allowance out of the personal estate. 13 Mass. 525.

Nor by a release to a third person under whom the tenant does not claim.—3 Metcalf, 40. If a husband and wife join in a deed of "all their right, title and interest" in certain premises, the wife, in her right, as to one quarter thereof—and at the close of the deed they executed in token of their "conveyance of all right, title and interest, whether in fee or freehold, in the premises"—*Held*: the wife will thereby be barred of her dower in her husband's three-fourths of land. 18 Pick. 9.*

A deed executed by husband and wife, she being under eighteen years of age, does not bar her right of dower. 10 Ohio R. 127; 7 How. 437, and *post*. p. 414, (note.)

§ 55. Where wife had renounced her dower in favor of a mortgagee of her husband, and after his death, on marshalling his assets, in a court of Equity, the mortgage debts were paid out of the personalty—*Held*: the widow was entitled to dower, and a sum of money assigned in lieu thereof was ordered to be paid to her, out of the lands which were ordered to be sold for payment of debts. 2 Bailey's S. Car. R. 252.

Other creditors have a right to aid of wife's mortgage for payment of their debts. *Ibid*.

§ 56. It will have been seen by the foregoing authorities, that, though dower, be a freehold estate, it may be transferred or relinquished by other modes than a regular legal conveyance—as, by such acts or agreements, as serve to bar the action for dower, though no conveyance be executed. 3 Ohio, 13.

*An agreement under seal, between a widow and the guardian of her husband's heirs, stipulated that the whole of one parcel of his lands was assigned to her for life, in full satisfaction of her dower, with all the conditions and incidents of dower, and the land assigned proved to be under mortgage—this was an assignment *against common right*, and the widow was barred as against an innocent purchaser of other land of the husband. 1 Pick. 314—and see *ante*. sect. 20, p. 382.

But, where debtor to a judgment and his wife sell land to A., wife of debtor relinquishing dower to A.—A. cannot afterwards set up that dower as a separate estate, against purchasers under the judgment.—5 Ohio, 527. For dower is not alienable, till duly assigned, so as to enable the grantee to maintain an action for it, in his own name—for it lies in action only. *Ibid.*

§ 57. Parol evidence is inadmissible to show a parol agreement between the husband and wife, to compensate her for relinquishing her dower. 2 M'Cord's Ch. R. 274.

Renunciation of dower is not such part performance, as will admit parol testimony to enforce specific performance.—*Ibid.* 276.

The fact that the wife has renounced her dower, raises no presumption that she is to be compensated, in order to let in parol evidence of an agreement to compensate. *Ibid.* 277.*

A widow who silently stands by and hears sale of estate proclaimed free of dower, is barred. 2 Ohio, 509—see 4 Dallas, 300.

§ 58. In Mississippi, where a husband has already executed a deed of lands, which is recorded, it is provided that a wife may subsequently relinquish her dower therein as follows:—"It shall be lawful, where any deed or conveyance shall have been recorded, and the *feme covert* hath not relinquished her right of dower, in the lands, tenements and hereditaments therein mentioned, for such *feme covert* to relinquish her right of dower in the manner directed by this act; and the certificate thereof shall be recorded in the court where such deed or conveyance may have been recorded, and shall be as good and effectual in law to release and bar her right of dower in the lands, tenements and hereditaments in such deed or conveyance mentioned, as if the same had been taken at the time such deed or conveyance was admitted to record." How. & H. p. 347, sect. 20—See also *ante.* sect. 54, p. 401.

*Husband conveyed land, and after his death, his widow, for a nominal consideration, conveyed to the heirs of the husband's grantee, all her right and title conveyed by her husband—*Held*: she was thereby barred of her dower. 2 Metcalf, 41.

§ 59. A magistrate cannot take the wife's renunciation of dower, upon a conveyance in which he is interested; and where the purchaser was a magistrate, a renunciation before him was held void, although the conveyance was taken to a stranger *in trust* for the children of the purchaser, and the latter had no longer any title to the land. 1 Bailey's S. Car. R. 421.

A renunciation of dower must be perfected at the time it was made; and when taken and certified by magistrate disqualified by interest, suppletory evidence that it was made by the wife freely and voluntarily, will not avail.—*Ibid.*—and see 2 M'Cord's Ch. R. 117.*

§ 60. By act of Mississippi—How. & H. 166—the emancipation of slaves does not bar dower; but those not freed shall be first subjected, and if insufficient, then the freed ones. See *ante*. 154, 158.

This provision is now rendered useless by the late acts prohibiting negroes to be emancipated. See *ante*. p. 157—Act of 1842—and see Leech *vs.* Cooley's adm'rs., 6 Sm. & M.

DOWER---IN PERSONAL ESTATE.

No dower of personal property was allowed at common law, but widow had *pars rationabilis*—Bracton's Fleta—and she could recover it by writ *de rationabili parte bonorum*, (a reasonable portion of the goods) of her husband—being *one-half*, if no children—and *one-third*, if children were living,—2 Bl. Com. 492. This law is now obsolete in England.

The statute of Mississippi declares that—"When a husband dies intestate, or shall make his last will and testament, and not make provision therein for his wife as aforesaid, she shall be entitled to share in the personal estate in the following manner, to wit: If there be no children, or if there be but one child, in that case she shall be entitled, out of the residue left after paying the debts of the deceased, to one half; but if there be more than one child, in that case, she shall be entitled to a child's part in either case in fee simple." How. & H. p. 352, sec. 42.

*A deed of land executed by husband and wife, but containing no words of grant by the wife, does not convey her estate in the land, nor her right of dower. 3 Mason's C. C. R. 347.

The widow is entitled to be endowed of the personal estate of her deceased husband, according to the law of the domicile of the husband. 2 Sm. & M. 617.

§ 61. Where an estate is insolvent, a widow can claim no distributive share in the personal estate of her husband, nor in a lease of land, (which is a chattel interest.)—Ware & Harper *vs.* Washington, Jan'y. term, 1846, High Ct. of Errors and Appeals of Mississippi---5 Sm. & M. See *ante.* sec. 51.

In January, 1844, the case of Garland, ex'r. *vs.* Rowan, was decided—in which it was settled, that the widow is entitled to be endowed of the personal estate of her deceased husband, according to the law of the place of the domicile of her husband; and that slaves like other personalty, are distributed and widows endowed thereof, according to the law of the decedent's domicile.*

This case being decisive of the construction of the statute, under which the question arose, a statement of it with the opinion of the court is here inserted.

“The record presents these facts: John A. Rowan being a citizen of the state of Virginia, and domiciled therein, departed this life in the year 1843, having previously made his will. That Samuel Garland, (the plaintiff in error,) was appointed one of his executors; that said will has been duly proven, and recorded in the state of Virginia, and said Garland alone has in said state, qualified as executor of the will; that said Rowan owned considerable real and personal estate, at the time of his death, in the states of Virginia and Mississippi. The personal estate consisting of slaves, &c.; that Mrs. Rowan had renounced the provision made for her by the will of her husband, and he having left no child or children, claimed as her share of her husband's estate, in the state of Mississippi, one half the personal property, including the slaves, as hers absolutely. The executor contended that her distributive share of the personal estate was governed by the laws of Virginia, the husband's domicile and place of residence at the time of his death. Mrs. Rowan filed her petition in the probate court of Washington county, to recover her share of the personal

*Whether the same rule would apply if the domicile was in a State, where slavery is not permitted by law—query? 2 Sm. & M. 615.

estate. The executor appeared and answered, setting up the above defence.

"The court decided that the laws of Virginia did not fix the right of the widow, or affect it. And although it was agreed that by the laws of Virginia, she was entitled to only one third of the slaves during her life, the judge decreed to her one half of the slaves that were in the state of Mississippi, at the time of her husband's death, absolutely; and decreed also that she was entitled to one half of the personal property, including the slaves, regardless of the debts that were owing by the testator in Mississippi, inasmuch as it was made to appear to him, that after allotting to the widow one half the personal estate, there would still be left more than enough to pay all those debts. From the decree of the probate court the executor appealed to this court, and assigns for error, the decree of the court below, in allotting dower according to the law of Mississippi, instead of that of Virginia."

"As to the real estate, there is no diversity of opinion; it is universally conceded, that such estate is governed, in its transmission and descent, by the laws of the country in which it is situated. In relation to the distribution of personalty, the law, though formerly the subject of much controversy, appears to be well settled, that the law of the domicile of the decedent is in general to give the rule. It is not universal in its application, nor without some exception, yet as a general rule it has been established with great unanimity."

"No authority is cited in support of the attempted distinction between a claim on a share of the personal estate made by the wife, or by a distributee. We have not been able to find any, unless it be the case in *Walker*, which will presently be adverted to. The various statutes of distribution seem to place the rights of the two classes on the same footing, and the elementary writers regard them in the same light, so far as the nature and character of their respective interests are concerned. The extent of the interest is another matter. *Toller*, 370. 2 *Lomax on Exec.* 201. We find one case, in a court of high character for learning and ability, in which the law of the domicile was applied to the share of a widow in the personal estate of her husband. *Smith v. Monroe*,

1 Iredell, 346. This too was a case in which slaves formed a part of the estate, and the law of Mississippi, in which state the husband had his residence, governed the disposition.

"The case of *Stegall v. Stegall*, 2 Brock. 256, places the right of the wife to a distributive share of the personalty, on a ground totally distinct from dower, holding that by adultery and elopement, her right to dower is forfeited, but that her right to a distributive share is not thereby affected. We see no reason to draw a line between the widow and the distributee, in this respect, and we cannot lend it our sanction.

"Neither do we find any authority which, in states where slaves are deemed and treated as personalty, justifies the attempted distinction as to them. *Wheeler's Law of Slavery*, 184. We find various cases in which they have been subjected to the rule, in North and South Carolina, and in Kentucky. 1 Iredell, 346. *Latimer v. Elgin*, 4 Dy. 26. *Sneed v. Ewing*, 5 J.J. Marshall, 460, a very elaborate case. We shall not lead the way in the introduction of an exception in this particular.

"We come next to the consideration of the case in Walker's reports. If taken in the broad sense in which it is pressed upon us, by the counsel for the appellee, it stands alone in its exposition of the law upon this subject among the modern authorities, unsustained by any other court. We are fully sensible that the stability of jurisprudence requires an adherence to the decisions of our courts. If solemn judgments, once made, are lightly departed from, it shakes the public confidence in the law, and throws doubt and distrust upon its administration. Yet even this backwardness to interfere with previous adjudications, does not require us to shut our eyes upon all the improvements in the science of law, or require us to be stationary when all around us is in progression.

"When a single case stands unsupported, and rests upon an unsound basis or an erroneous application of principles, it is better, in the language of an eminent judge, "to abandon it, than to attempt to build upon it." The court has heretofore felt constrained to depart from former decisions of its predecessors. Perhaps no general rule can be laid down on the subject. The circumstances of each particular case, the extent of influence upon con-

tracts and interests which the decision may have had, whether it be only doubtful or clearly against principle, whether sustained by some authority, or opposed by all; these are all matters to be judged of, whenever the court is called on to depart from a prior determination. When all this has been done, if no particular mischief is likely to ensue, we believe it to be our duty to decide according to our own convictions of the law."

"Questions upon the conflict of laws, were but a few years ago, comparatively little understood. Cases seldom arose, and when they did, they were not examined with the benefit of those lights, which the researches and labors of modern jurists have thrown upon them. The first work on this subject in the English language, was written since this case in Walker was decided. Of late years, from the enlarged and easy intercourse among the communities which constitute the great family of civilized nations, they have greatly increased. But nowhere has this increase been greater than in the United States, because of the nature of our confederacy, the enterprising character of our citizens, and the general diffusion of wealth through the community. A fine writer has said, "that the attention of our courts should now often be drawn to cases of this character, results from the political confederacy of the states, which while it supports among them close and extensive connections in business and policy, yet holds them sufficiently distinct and independent to call into continual exercise that rule which expounds and gives effect to contracts and other transactions, according to the state law, under which they are made to take place, but stops there and carefully distinguishes between construction and right on the one hand, and remedy on the other." 4 Cowen. 510, n. It is not strange that the frequent discussions of this point, of late, should have rendered the doctrine more familiar than it was at the time that decision was made, or that the court should have mistaken a rule, then but rarely called into exercise, and having but little reference to the ordinary transactions of business.

"We have seen with what general assent the rule has been adopted; it may not be out of place to give some examples of the estimate placed upon a refusal to adopt it. Lord Loughborough said, "it is a clear proposition, not only of the law of England,

but of every country in the world, where law has the semblance of science, that personal property is subject to the law which governs the person of the owner, both with respect to the disposition of it, and its transmission either by succession or by the act of the party." *Sill v. Worswich*, 1 H. Blk. 690. The supreme court of North-Carolina, in a recent case said, "no country having a just regard for its own character, or the comity due to other countries, can refuse its authority to collect and apply the goods within her jurisdiction in the proper course of administration." 1 Iredell, 346. The law of the domicil was declared to give the rule, and in the case of a widow whose husband's domicil was Mississippi, and whose claim was for her share of her late husband's slaves. The supreme court of Tennessee, in overruling one of their own decisions upon a kindred subject, lately said, "but to this decision we cannot assent. The contrary doctrine is supported by a weight of authority altogether overwhelming, and it is based upon grounds of just reason and international convenience, to disregard which, would almost place a state without the pale of civilized communities." *Alsop v. Alsop*, 10 Yerger, 286.—This doctrine commends itself to our sanction so forcibly that we cannot resist it, and we must of necessity, give up the case in *Walker*, if it is to be understood in the latitude contended for. But in one point of view the case is supported by other authorities, and limited to that extent, and to the actual state of facts then before the court, we have on this occasion no necessity to speak of it. The parties in that case resided in Louisiana, and in that state slaves are regarded as realty, or as immovable property. The counsel for the party who prevailed in that cause, rested his argument in a great degree upon the want of reciprocity in the rule between the two states, where one regarded slaves as immovable, and the other as movable property. Under the law of either state, if the law of the domicil gave the rule, the citizens of Louisiana were to be the gainers. Mutual courtesy and international comity lay at the foundation of the rule. This principle is often acted on in the intercourse of nations, and may be more than just. *Story Con.* 357. But with this limitation the rule does not avail the appel-

lee in this case, because in the state of her domicil, slaves are deemed to be personalty.

“In the same argument the distinction is drawn between the right of dower and the right of distribution, but the cases cited arose under the custom of London. That custom adheres to the persons of its freemen, into whatever part of the kingdom they go, and it furnishes no rule for the construction of the statute of distributions, because it is excepted from the operation of the English statute. See *Pipon v. Pipon*, Ambler, 25.

“The decision in *Walker* carries the rule beyond the point of reciprocity. It rests upon a distinction drawn between the claim of the widow on the personalty, and the claim of the distributee. We have already stated that we could find no authority for this distinction in the general common or statute law, as contradistinguished from the civil law, and the custom of London. The statutes of distribution, ours among the number, treat her claim as a claim to distribution, and it is so treated by the writers on this branch of the law. 2 Lomax on Ex. 201. The only point of difference in the succession to personalty is, that the wife cannot be excluded by the will of her husband from all share in it. But this is not a question of exclusion, it is only a question as to the law by which the succession is to be regulated.”

“It is insisted in the argument that if the rule is applied to slaves, in this country much mischief may result from it. That if a person having his domicil in a non-slaveholding state, and owning slaves here, should die, the slaves would have to be emancipated despite our own laws. We do not think this consequence would follow. An exception to the general rule, as firmly settled as the rule itself, is that the international law, or law of comity, is not permitted to operate within a state to the prejudice of the government in opposition to its settled policy, or to the interest of its citizens. Story, 30. The consequence could be avoided too, if necessary, by limiting the rule by the principle of reciprocity, and by giving force to it, as to this species of property, only in reference to the slave states. As Virginia is one of that number, the question in this respect, cannot arise in the present case, and we may safely leave it to be determined, when the

exigency shall arise. That precise question, however, has been before the courts of Kentucky, in the case of a person who died in Indiana. The court gave effect to the laws of Indiana, saying that the representative might sell the slaves, and distribute the proceeds according to the laws of that state. *Sneed v. Ewing*, 5 Marshall, 482."

"Any other rule than this, giving effect to the law of the domicile, would sometimes work injustice, and prove the source of difficulty in its practical operation. A widow, like a distributee, is only entitled to her share of personalty, after the payment of the debts. In this case, the estate is found in four different states. It would not be easy to adjust the share in each state, after the payment of debts, for in some of the states the debts might exceed the effects therein. The administration in the state of the domicile is regarded as the principal one, in the others only as ancillary. Before distribution can be rightfully made, all the debts everywhere must be paid. Creditors in each state have a right to be paid, before the funds are withdrawn therefrom, and to be paid according to the priorities and preferences existing by the laws of such state, so far as the assets in that state go. See *Hanry v. Richards*, 1 Mason, 381. *Davis v. Head*, 3 Pick. 128. 5 Peters, 518. Now suppose we give effect in favor of the widow, to the laws of this state. Suppose farther, that the debts in Kentucky largely exceed the effects there, and that the unpaid Kentucky creditors sue the executor in Virginia, and throw the burden upon the estate there, then manifestly the widow is benefited at the expense of the other distributees, who have obtained no preferences here. She would get a share not reduced by the payment of any debts out of this state. We might go farther, and suppose the Virginia estate to be exhausted by the payment of the debts, and the injustice would then become more glaring.

"We think, therefore, the rule adopting the law of the domicile as the right one to govern distribution, to be more just and equitable. By that rule, after the payment of all the debts, wherever found, the surplus of the whole personalty, wherever existing, is subjected to one uniform law, and all claimants by succession satisfied according to that law. This brings about equality, which

in the absence of prior rights is equity. There is one harmonious and consistent rule, instead of rules as numerous as the states, in which the property is found." 2 Sm. & M. 617-636.

§ 62. By act of Mississippi, 1839, it is made the duty of the Judge of Probate, in this State, "upon the application of the widow of any deceased person, to appoint three commissioners, whose duty it shall be to select and set apart, out of the stock of provisions or effects of the said deceased person, one year's provision for the widow and children." How. & H. 421.

By same act, it is provided, that "all property, now exempt from execution, under the provisions of the existing laws of this State, shall, upon the death of any person possessed of the same, descend to the widow of the deceased, and be exempt in the same manner as in the deceased before his death."* *Ibid.*

DOWER—GENERALLY.

§ 63. When the husband makes a gift to his wife, of articles to be worn *as ornaments of her person* only, such articles are to be considered her *paraphernalia* only; and from the *nature* of the donation, the wife cannot dispose of the specific things given. They are liable to the debts, engagements, and alienation of the husband during his life, but not subject to his disposition by will. 2 Atk. 78; 3 ib. 358.

Equity so protects wife's interest, that if husband die indebted, and her *paraphernalia* are taken by specialty creditors, after exhaustion of all the personal estate, she may take the place of such creditors and reimburse herself out of the *real* assets in the possession of the heir, to the amount of her paraphernalia so subjected. 3 Atk. 369.

And she is entitled to have incumbrance, created by her husband on her *paraphernalia*, discharged out of his general personal estate, to the prejudice of *legatees*. For *her* right is anterior

*By act of 1824, it was enacted, that "on all estates, the widow shall be allowed *one horse*, not exceeding in value \$100—one cow and calf, one bed, bedstead and bedding; provisions for the support of herself and the children for one year; and such other household furniture as she may think proper to select, not exceeding in value \$50—all of which she shall reserve out of her husband's estate, exempt from all claims, debts, and demands whatsoever." And by same act—"this provision shall not interfere with her dower in real or personal estate." How. & H. 415. See North on Probates, note to page 246.

to, and to be preferred to theirs, which are merely voluntary. 1 P. Wms. 730; 3 Atk. 370, 375; Roper on B. & F. 188.

§ 64. Where an executor having power by the will to sell the real and personal estate, sold the realty, and the widow united in the deed for a nominal consideration, without intending to give up her right to an equivalent out of the purchase money, for her dower in the realty so sold; and the widow applied by petition to the Probate court for her one-third of the proceeds of the sale, and the Probate court dismissed the petition for want of jurisdiction—*Held*, that if by the terms of the will, and the action under it, the real estate was reduced to personalty, the court had jurisdiction, and should entertain the petition. 4 Sm. & M. 273.

If the widow voluntarily and without fraud, but for a nominal consideration alien her right of dower in realty, it seems the Probate court will have no jurisdiction of a petition of the widow for compensation out of the personalty of her husband. She must rely for compensation, on her contract, express or implied, under which she parted from her dower; and must seek her relief in a court having jurisdiction of contracts. *Ibid*.*

§ 65. The widow is entitled to only *one-third* of such personal estate as is left by her husband *at his decease*, undisposed of by advancement or otherwise. 1 Pick. 157.†

*Where a widow filed her bill charging her deceased husband with selling and conveying his land fraudulently with intent to defraud her of her dower, and praying dower and damages for the detention thereof, and the Chancellor submitted both the validity of the deed and *quantum* of damages to the jury—*Held*: the jury could not properly decide the question of damages, but only that of validity. 1 Humphreys, 1. The finding of the jury does not preclude the court from afterwards fixing the true amount of damages. *Ibid*.—But see 2 Murph. 79, *contra*.

† Lands purchased by partners under an agreement that they shall be sold for the benefit of the partnership, will be regarded as joint stock; and will be likewise so considered, though there be no agreement, if there be such an application of them to the purposes of the concern, as evidences an original understanding of the parties that the lands are to be treated as such, and not as estates in common. But where there is no such agreement, nor such an application of the lands as evinces the original understanding to have been, that they were considered joint stock, the wife of a deceased partner is entitled to a dower in such lands. 3 How. 360.

Where two persons formed a commercial co-partnership for the purpose of carrying on business, but afterwards by mutual consent, extended their business to the buying and selling of lands and town lots, conveying not in the partnership style, but in their individual names as tenants in common—*Held*: the lands and

The rents and profits of real estate, received by the executor or administrator, constitute no part of the personal estate of the deceased, and therefore the widow is not entitled to a distributive share thereof. *Ibid.*

And where A. being seized of lands in fee, devised a certain interest therein to his widow, and the rest of his real estate to B.—and at the death of A. crops were growing on the lands devised to B., and by him were gathered—and the widow dissented from the will, and filed her bill in equity against B., for her dower from the death of the devisor—it being ascertained that the provision made for the widow was not equal to her dower—her dower was allotted to her. But the court refused to call B. the devisee, to account for the profits—because if the husband had died intestate, the crop would have gone as assets to the administrator, of which she could have claimed only a distributive share. 2 Murph. 175. .

§ 66. If a widow commit waste in the lands of the deceased, she shall be liable to an action by the heir or devisee, or his or her guardian; and if she marry a second husband, he shall be answerable for any waste committed by her before marriage, or by himself afterwards. Acts 1821—How. & H. 351.

In cases, where any slave or slaves have been or shall be devised to any widow for life, *in lieu of her dower*, or have been or shall be held by any person, for his, or her life only, or the life of any other person or persons, every such person entitled to such life estate, or his or her guardian, if he or she be an infant, shall

lots so conveyed by the members of the firm, were subject to the dower of the widow of one of the deceased partners. 7 How. 437.

When a marriage contract does not amount to more than a reservation to dispose of the individual property, at death, and no disposition is made by the parties, the property is subject to the course prescribed by law. Nor is such a contract a jointure which will bar the wife's claim to dower. 2 How. 692.

An infant feme covert, is not estopped by a relinquishment of dower made during coverture. 7 How. 437. If a *feme covert* relinquish dower during her infancy, she will not be compelled to refund any portion of the purchase money received by her husband, if she afterwards claim dower. *Ibid.*

The widow cannot renounce her rights under a will given in lieu of dower, and insist upon dower after the expiration of six months from the time of the probate of the will. *Id.* 665.

Where an order for publication was made by the Probate court, on the filing of a petition for dower, it will be presumed, in the absence of any evidence to the contrary, that the publication was made. 3 How. 205.

within sixty days after coming to the possession of such slave or slaves, cause to be lodged with the clerk of the Probate court of the county wherein he or she resides, a list containing the names of all such slaves, describing their ages and sexes, under the penalty of fifty dollars for each slave.

Such clerk shall record said list in a well bound book, to be kept for such purpose, for which he shall receive from the person furnishing any such list a fee of one dollar. The increase of all such slaves shall, within the like times, from their births, in like manner, be registered with the said clerk, under the like penalty, and for a further fee, in each case, of twenty-five cents.

In case of the inter-marriage of any such widow, her husband shall, from that time, perform all the duties required by this section, under the like penalties.

And all the penalties hereby incurred shall go and accrue to any party aggrieved, to be recovered with costs, by action of debt, in any court having competent jurisdiction. Acts 1821—How. & H. 402.

CHAPTER LIX.

DESCENT----WHAT?

§ 1. Descent, (or, as termed by old law writers, Discent,) is that title by which a man, on the death of his ancestor, obtains the freehold of such ancestor, by right, or representation, as his *heir-at-law*.

An *heir*, therefore, is he *upon whom*, the *law casts* the estate, *immediately*, on the death of his ancestor.*

*Descent implies derivation *from* and not *through* a parent. 3 Mason's C. C. Rep. 399; 2 Peters, 58.

§ 2. It must also be observed, that such descent can only take effect as to land of which the ancestor died intestate—(unless, indeed, the ancestor devise just such an estate as the heir would have taken, without any will, in which case the law will, (in favor of creditors,) consider the heir as taking by *descent*.) For, as regards lands *devised*, the devisee will not take by *descent*, but by *purchase*, which differs from descent, in this—that *purchase* arises out of the agreement, or other act of the party, and not by mere operation of law. (See on this point, 1 Har. & John. 478.)

The importance of preserving this distinction consists in this,—that whoever claims by descent must be of the *blood* of the first purchaser, and also heir of him who was last seized; but an estate acquired by purchase is descendible to the owner's heirs generally, and not only to the blood of the particular ancestor from whom such owner derived it.

In the former case, the claimant must trace back his descent to the same ancestor with the person last seized.*

But in the latter case, it is only necessary that the claimant should be the next of kin to the deceased owner, and capable of inheriting. For, *seizina facit stipitem*.†

§ 3. The seizin. above mentioned, must have been an *actual* seizin, either by the ancestor's own entry, or the possession of his lessee, or of the lessee of his ancestor, or by receiving rent of the freehold, or (in case of incorporeal hereditaments,) by what is, in such case, equivalent to corporeal seizin, receipt of rent and the like.‡

*By stat. 3 and 4 William IV. ch. 106, it is provided that the claimant by descent must be the "heir to the last person entitled who did not inherit," instead of the person "last possessed." This statute has abolished the feudal maxim of "*seizina facit stipitem*."

†Descent is suspended during estate of dower or curtesy, and the heir is not seized so as to form a new stock or "*possessio fratris*." 3 John. Cas. 214. The reason is, that the widow's entry is a continuance of her husband's estate without interruption. Co. Litt. 15, a. See also 13 John. 260.

‡Where lands are located and surveyed by the ancestor, and patented to the heirs, the heirs take by descent and not by purchase. 1 Ham. 395.

The interest under a lease of ninety-nine years is not descendible. 7 ib. part 1st, 119, 124. So, settlement claims in Pennsylvania. 3 Yeates, 571; and 1 Dana, 211.

Where a testator gave real and personal estate on condition, and the residue of his estate real and personal to his wife—the conditional legatees and devisees

A bare right of entry is not sufficient to constitute such seizin.

And the reason of this rule is, the law requires *notoriety of possession*, as evidence that the ancestor had the property in himself.

§ 4. Of the canons of descent, which existed at common law in England, and which once obtained in the American colonies, but few remain in force within the United States; most of them having originated in reasons of feudal policy, incompatible with the principles of a Republican government.

Those which have been abolished are—

1st. Inheritance shall lineally descend and not ascend. (This rule is also altered in England, by statute of Wm. IV. 1834.)

2d. The male issue shall inherit before the female issue, the former being esteemed the most worthy.

3d. Where there are two or more *males* in equal degree, the eldest only shall inherit—(but the females all together.)

4th. The *collateral heir* of the person last seized, must be his next collateral kinsman of the *whole blood*.* (Altered by statute of Wm. IV. so that half blood may inherit in England.)

4th. In collateral inheritances, the *male* stock shall be preferred to the *female*, unless the lands had descended *from a female*.

DESCENT----REPRESENTATION.

§ 5. The 4th & 5th canons of descent have, with various modifications, been preserved in the United States—namely:

Canon the 4th.—The lineal descendants, *ad infinitum*, of any person deceased, shall *represent* their ancestor.

This taking by *representation* is called succession *in stirpes*, according to the roots; *since* all the descendants (or branches,) inherit the same share, that their *root*, or ancestor would have had.

came into possession of the property, but forfeited the same by non-performance of the condition, though not till after the death of the residuary legatee—*Held*: on the death of the testator, a contingent interest in the estate, real and personal, vested in the residuary legatee, which was transmissible to her heirs and personal representatives respectively. 10 Pick. 463. See *post.* sec. 8, note.

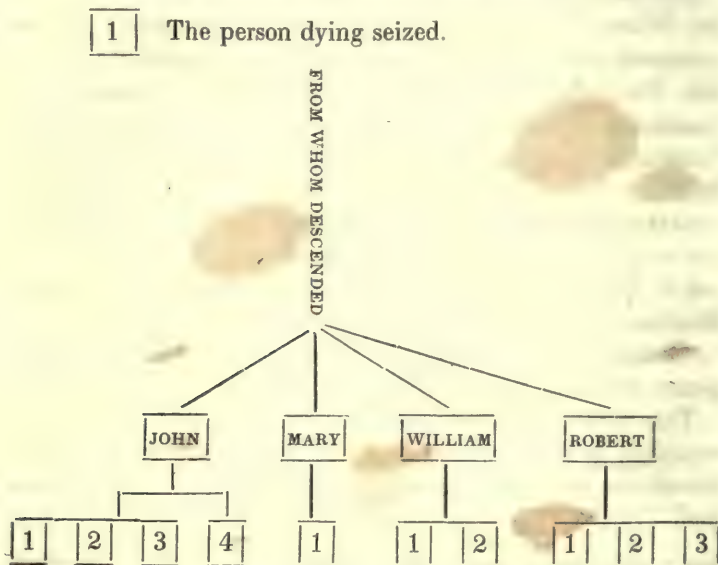
*In Mississippi, the distinction between half and whole blood is so far abolished, that its only remnant is—"the kindred of the *whole blood*, in *equal degrees*, is preferred to the kindred of the *half blood*, in the *same degree*." How. & H. ch. 36, sec. 31, p. 394.

This rule, although many of the reasons in which it was founded in England, no longer operate here, has been to a certain extent, on account of its natural justice, adopted in all the States of the Union.

In Mississippi, the statute regulating descents, provides, that "in case of intestacy, and descent of lands, the descendants of the deceased child or grand-child, shall take the share of the deceased parent, in equal parts among them." How. & H. ch. 36, sec. 31, p. 393.

But by the same statute, it is provided, that "there shall be *no* representation among collaterals, except with the *descendants* of the *brother* and *sister* of the intestate."* *Ibid.*

The following scheme will illustrate this rule:—



*Where testator devised all his estate to his wife during widowhood, without disposing of the remainder, and died leaving several children, and, after the death of the testator and before the termination of the wife's estate, one of the sons died insolvent, leaving one son his sole heir—*Held*: the reversion was chargeable with the debts of the deceased son, under the statutes of this commonwealth (Massachusetts,) altho', at common law, the estate would descend to the grand-child, as heir of the grand-father, and would not be assets for the payment of the debts of the mesne reversioner.—14 Mass. 88.

The figure [1] represents the ancestor last seized, and dying intestate. Suppose that before the death of such ancestor, John had died leaving four descendants, and Mary, and William, and Robert, his surviving brothers and sister. In that case, the four children of John would take only one-fourth, that being the share which their deceased parent (or stirps-root,) would have taken, had he lived.

So, if one of the children of John had died before the death of his grand-parent, leaving two children, these last would have been entitled each only to one-eighth of the estate, that being the share which John's deceased son, whom they represent, would have taken had he survived his grand-parent. And so on, *ad infinitum*, to the latest descendants of the person dying seized.

In like manner, if all the lineal descendants of the grand-parent had died before him, and either of his brothers had died before the descent was cast, the descendants of such deceased brother would have taken their deceased parent's share.*

DESCENT---COLLATERAL.

§ 6. *Canon 5th.*—On failure of *lineal* descendants, or issue of the person last seized, the inheritance should descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules. (This rule is now altered in England by statute, so that the lineal descendants of the *purchaser* is preferred.)

In Mississippi, this rule is adopted with the following modifications:

1st. The distinction between the whole and half blood is abolished—(except, where they are in the same degree, in which case the whole blood is preferred.)

2d. No difference is recognized among male and female collateral relations.

*Where A. died seized of lands, leaving two children of a deceased sister, and a son of a deceased brother, his heirs at law, such heirs must (by statute,) take *per stirpes* and not *per capita*. 6 John. 322. See also 5 Har. & John. 23.

The children of a deceased brother shall not take, in exclusion of the grandchildren whose parent deceased before the intestate; but the grandchildren shall take the share of the parent by representation. 1 Pen. 7.

3d. On failure of lineal descendants, and of brother and sister, or their descendants, the property will *descend* to the *father* if living, and if not, to the mother of the intestate.

4th. If there be no lineal descendants of intestate, nor brother, nor sister, nor their descendants, nor father, nor mother—*then* the estate of the intestate shall descend, in equal parts, *computing by the rules of the civil law*.*

Collateral kindred differs from lineal, in this—that although they descend from the same common stock, they do not descend one from the other.

Collateral kindred, then, are such as spring from one of the same ancestor, who is the *root* or common stock from whence these relations are branches—2 Bl. Comm. 204. And collateral consanguinity consists *essentially* in this descent from a common stock. *Ib.* 205; Wms. on Exrs. 249.

The mode of computing by the civil law, is to count *upwards* from *either* of the parties related to the *common stock*, and then *downwards* again to the other, reckoning a degree for each person, both ascending and descending. 2 Bl. Comm. 207. In other words, to take the sum of the degrees in both lines to the common ancestor. *Ibid.* in note. Wms. on Exrs. 249.

§ 7. In a case reported in 4 Pick. 93, the question arose whether, under a statute of New-York similar to the statute of Mississippi above quoted, the common law rule which forbids the mother of an illegitimate child to inherit from him, had been abrogated by the adoption of the civil law rule of computing kindred, in relation to descent. The court in that case said, “We are not able to adopt the opinion, that our legislature, in using the same term in our statute of descent and distribution, intended to apply the term to those who by common law, were not deemed children in a relative sense to parents. But we should

*Civil law means that which the old Romans used, compiled from law and nations. It is founded—1st. On the regal constitutions of ancient kings—next on the twelve laws of the *Decemviri*—then, on the laws and statutes enacted by the senate or people, the edicts of the Prætor and the opinions of learned lawyers—and *lastly*, on the imperial decrees or constitutions of successive Emperors. Tomlin’s Law Dict. Tit. Civ. Law.

When a man dies without a will, that person is esteemed his *nearest of kin*, who was so at the time of his decease. Justinian, Lib. 3, Tit. 2, sec. 6.

think if such had been their intention, an express provision would have been made for illegitimates." And again—"Our statute of distributions, though borrowed from the civil law, cannot be construed to have repealed the common law in this respect. It merely provides for the distribution of property according to the rules of that law, among lawful kindred, *without adopting its principles* in settling who shall compose that kindred." This case reviews and dissents from decisions in case of *Heath & wife vs. White*, reported in 5 Connt. Rep. 228—by which it was established that the civil law rule did control the common law rule in this respect. See also 2 Dana, 363—which decides that the words "brothers and sisters," mean such as are *legitimate*.

In Mississippi, in case of *Doe ex. dem. Hickey vs. Gilbert & Deloach*, 1 How. 32—it was settled that, "where one died possessed of real estate, leaving no children, nor descendants of them, nor father or mother, the estate shall go to the brothers and sisters of the mother, in preference to the son of the brother of his grand-mother;—because, computing according to the rule of the civil law, the former are in the third degree, and the latter in the fifth degree. The statute does not give a preference to the relations of one side over those of the other, nor is there any thing in the statute to authorise the opinion that the more remote relations in blood of the first purchaser, shall inherit, in preference to the nearer relations not of that stock." In this case the land had descended to the intestate from his father and not his mother; and the descent cast under the act in force in 1806, which provided in similar cases, that "such estate shall descend, in equal parts, to the next of kin of the intestate, in equal degree." Our present act, which does not use the words "next of kin," was not passed till 1807. This decision, therefore, relates only to cases occurring under the act of 1806; and it is not authoritative as to the construction of the act of 1807, under which we now live.

DESCENT----STATUTE OF.

§ 8. Having thus briefly adverted to the changes made by statute, in the canons of the common law regulating descent, as applied to the States of this Union, and especially to the State of Mississippi, we will insert the statute of descent and distribution;

and as they are both of like import, they will be considered together, care being however taken to notice such points of difference as may exist whenever they occur.

“When any person shall die seized* of any estate of inheritance in lands, tenements or hereditaments not devised, the same

*Interest in land warrants descends to heirs. 3 Yerger's Repts. 201. Lands patented to the “heirs” of the person who entered and surveyed it, will vest in them by descent, and are subject to sale under an execution against the estate of the decedent. 1 Dana, 211; 1 Ohio, 403. And where a person was entitled to a donation claim, under an act of Congress, recognised by certificate of board of commissioners to “his heirs,” and confirmed by a patent, they take by descent. *Ibid.* 91. The patent in such case relates back to the act of Congress. *Ibid.*

If there be a contract for the purchase of land, it descends in equity to the heirs, and they may call on the administrator to discharge the contract, out of the personal estate, to enable the heirs to demand a conveyance from the vendee. 6 John. Ch. Rep. 402.

And the purchase money of lands sold by executory contract, belongs to the vendor's heirs, to whom the legal title has descended;—and if such heir dies, it passes to *his* heirs. 2 Dana, 386.

A covenant of warranty broken in the life-time of the ancestor, descends to the heirs. Cooke's Repts. 447.

Lands directed by testator to be sold, but not devised for that purpose, until a sale, will descend to the heir; and if converted, the rule at law is the same—the doctrine of conversion being confined to courts of equity. 2 No. Carolina Repts. 439.

Where equitable becomes united with the legal estate, both being co-extensive, the former is merged in the latter, and both descend according to the rules of law. 1 John. Ch. Rep. 417. *But*—if the trustees of a legacy for an infant *feme covert*, which is invested in lands and mortgages in their names as trustees, take a relinquishment of the equity of redemption in the mortgaged premises—the nature of the infant's property is not so changed as to alter the course of its descent upon her death during her minority, and the proceeds would go to her husband, not her heirs. 4 Paige, 409.

If the expression in the statute is nothing more than seized, without any explanation, the English law is adopted, and ownership, without *seizin*, is not sufficient to entitle the heir to inherit. See Comstock's Digest, 341—also 6 John. 96; 13 John. 260; 2 Peters, 625. This last decision was rendered on a statute of Maryland, by which, said the court, “a person claiming as heir, must prove himself heir of the person last actually seized of the estate.”

And therefore, during the continuance of dower or curtesy, the heir has not such a *seizin* as will constitute him a new stock, or create what is called *possessio fratris*. 3 John. 214.

And in Virginia, before the 1st January, 1787, (when the acts of Descents took effect,) if a person entitled to a reversion in fee, expectant on an estate for life, died in the life-time of the tenant for life—such person never had *seizin* of the inheritance, and could not therefore transmit to *his* heirs, but the *heirs of the person last actually seized* were entitled. 6 Munford, 422. The act of 1787, here recited, uses the words, “having title to any real estate,” to designate the kind of interest which shall descend, and of course abrogated the rule which required *actual seizin*.

But in case of a reversion, if the reversioner alienate his interest, of which he *cannot have* actual *seizin*, this will be equivalent to *seizin*, and will make him a new stock or root of inheritance. 3 Cruise, 467.

See page 419, note [†]

shall descend to his or her children, or their descendants, in equal parts*—the descendants of the deceased child or grand-children to take the share of the deceased parent, in *equal parts* among them. And when there shall be no children of the intestate, nor descendants of such children, then to the brothers and sisters of the intestate, and their descendants in *equal parts*, the descendants of a brother or sister of the intestate to have in equal parts among them; and when there shall be no children nor descendants of them, nor any of them, then to the father, if he be living, if not, to the mother of the intestate. If there be no children of intestate, nor descendants of such children, and no brother or sister, or descendants of them, nor father or mother—then such estate shall descend in equal parts, computing by the rules of the civil law. And there shall be, in no case, a distinction between

*According to the principles of the common law, an illegitimate child is "*filiius nullius*," and can have no father known to the law. And when the legislature speaks in general terms of *children of that description*, without making any exceptions, the court is bound to presume they designed to include the whole class. 14 Peters, 178.

In Connecticut, a bastard may inherit of his mother—5 Connt. R. 228; 6 ib. 35. And bastards there may also inherit of each other. 2 Root, 280.

In Massachusetts, bastards could not inherit from their mother, till the act of 1829. 4 Pick. 93.

In Kentucky, bastards have no inheritable blood, and cannot in legal contemplation have either brother or sister. 2 Dana, 263.

In Mississippi, it has been decided that bastards are not comprehended under the word "*children*" in the statute. But our statute has so changed the common law, as to render a child born out of wedlock, legitimate by the subsequent marriage of, and recognition by his parents. 7 How. 106.

"If the mother of any bastard child, and the reputed father, at any time after its birth, intermarry, the said child shall in all respects be deemed and held legitimate." How. & H. digest, ch. 32, sec. 3, page 334.

In Virginia, where a similar act to this exists, it has been decided, that an illegitimate child, born before the act, (which passed in 1787,) of parents who also intermarried before that period—the father who died in 1788, having by his will recognized such child as his own—is entitled to an equal share with the children born after such intermarriage. 3 Henn. & Munf. 225.

An infant is *in existence* for the purpose of taking any estate which is for his benefit, by descent, devise, or distribution, from the time of his conception. 4 Sm. & M. 99; 2 Paige, 35.

But an infant must be born alive, and after such a period of *foetal* existence, that its continuance in life may reasonably be expected. *Ibid.*

Children born within six months after conception, are presumed to be incapable of living, and therefore cannot take or transmit property, unless they *actually survive long enough* to rebut the presumption. 2 Paige, 35.

A child born within eight months and 21 days, after the death of his sister—held entitled to distributive share of her estate. 4 Sm. & M. 99.

So, an infant delivered by the Cæsarean operation after the death of the mother, may inherit. 2 Paige, 35.

the kindred of the whole blood and half blood, *except* the kindred of the whole blood in equal degrees, shall be preferred to the kindred of the half blood in the same degree—(saving to the widow of the intestate, in all cases, her dower.) See How. & H. pages 351, 353, as to Dower. “And where there shall be no children of such intestate, nor descendants of them, then the widow shall have as her dower *one half* of such before mentioned estate of her deceased husband.” Chap. 36, sec. 31, How. & H. p. 394.

DESCENT----AS BETWEEN HUSBAND AND WIFE.

§ 9. If any resident of this State shall die leaving no lineal or collateral relations, capable of inheriting, but shall leave a widow, such widow shall inherit the whole estate. Act 1829—How. & H.*

When any *feme covert* shall die possessed of any estate, real or personal, which might under the existing laws of this State be subject to escheat to the State, her husband shall take and inherit the same, and the same shall vest in her said husband for the use of himself and his legal representatives, forever. Act 1829—How. & H.†

By act of 1846, sec. 6, p. 153, amendatory of the act of 1839, it is enacted that it shall be competent for a married woman by deed of conveyance executed jointly with her husband, according to the laws of this State in relation to deeds made by *feme covert*, to sell and convey her real estate as fully and effectually as she could do, if she were unmarried. If any married woman shall die seized and possessed of real estate or freehold, acquired

*By act of 1846, chap. 57, sec. 1 & 2, it is enacted, that the widow of any deceased husband shall be allowed and entitled to *all* the personal estate of her deceased husband, which is by law exempt from sale or distress under execution—and shall hold the same free and exempt from sale or distress for any debt or demand whatsoever, contracted or originating during the life of such deceased husband, and from any debt or demand which she may contract after his death; and commissioners to appraise the estate of a deceased person, and set apart the widow's dower and allowance, and to apportion insolvent estates among creditors, shall each be allowed out of such estates \$1 per day, and no more, for their services.

†The husband is considered as next of kin to his wife, by relation of marriage, and takes her property as such, in case of her death—but whether so considered or not, her personal property remaining after death, goes to the husband, either *jure mariti*, or as next of kin. 4 How. 224. But see act of 1846, *supra*.

under the provisions of the act, to which this is an amendment, (act 1839,) her husband surviving shall be entitled to tenancy of the same by curtesy, as in other cases; and if she die possessed of slaves or other personal chattels as her separate property, *leaving issue of her body*, either by a former husband or by surviving husband, such slaves and other personal chattels shall descend to her child or children, *in equal shares*. But, if she die *without issue surviving* her, the same slaves and other personal property shall vest in the surviving husband.

CHAPTER LX.

DISTRIBUTION.

§ 1. When any person shall die possessed of goods and chattels, or personal estate not bequeathed, the same shall *descend** to, and be distributed among his or her heirs in the same way and manner that real estate not devised, descends by this act—*Provided*, that the goods, chattels or personal estate of any person deceased, whether testator or intestate, shall stand chargeable with the payment of all the just debts and funeral expenses of the deceased, and charges of settling the said estate. And after

*In the case of *T. & J. Cable vs. Martin & Bell*, it was decided by the High Court of Errors and Appeals of Mississippi, that "personal property does not 'descend' according to the strict technical meaning of the term, but is a *statutory* descent, and was intended to designate only the persons entitled to inherit, and not the kind of title conferred. Descent is a technical term, signifying the means whereby the lands are derived from the ancestor to his heir. But it will not do to adopt it with all its force, and apply it to *personal* property not bequeathed.—If it were so construed, it would deprive the administrator of the possession of personal property—for the heir is entitled to his inheritance, immediately on the death of his ancestor: whereas it is clear that the administrator is entitled to the possession of the personal property. 1 How. 558.

the payment thereof, the *surplusage*, in case of intestacy, *shall be decreed by the Orphan's court*, to the persons entitled to distribution thereof, according to the provisions of this act; and the *lands*, tenements, and hereditaments of the testator or intestate, shall *stand chargeable* with all the debts *over and above* what the personal estate shall be insufficient to pay, as aforesaid, *saving* to the widow her dower in all cases.

§ 2. Where any of the children of a person dying intestate, or their issue, shall have received from such intestate, in his lifetime, any real or personal estate by way of advancement, and shall choose to come into the partition and distribution of the estate with the other parceners and distributees, such advancement, both of real and personal estate, shall be brought into *hotch-pot* with the whole estate, real and personal, descended, and such party returning such advancement as aforesaid, shall thereupon be entitled to his or their proportion of the whole estate so descended, both real and personal—*Provided*, that when an infant having title to personal estate, shall die before attaining to the age when one may legally bequeath that kind of property, or after obtaining such age, shall die without bequeathing it, those of his or her kindred shall succeed to the said infant, who would have succeeded if he or she had been at the time of his or her death of the age of 21 years. Acts 1821—How. & H. 394.*

§ 3. In the distribution of real and personal estate, it must be ascertained before any order of distribution can be made, and issued—who are the persons entitled under it? What advances have been made to any of them? Whether any of the real estate was held in common or joint tenancy—and if so, how?—What lands and estate are to be divided, and in what proportion of each? And the parties interested must have been duly notified. 1 Chip. 357.

*In the distribution of real or personal estate among heirs, no deduction can be made from the share of any one of them, on account of any debt due from him to the estate. 17 Mass. 81, 93; ib. 356. See *ante*. pages 351, 352—and see 1 Binney, 35, 8, in which the opposite rule is established—and see 2 Har. & John. 191.

§ 4. By *advancement*, is meant such real or personal estate, as the father in his life-time may have bestowed on one or more of his children. And to constitute such an advancement, the title must have passed from the father to his child, during the life of the parent, though not the possession. 3 Bac. abr. And it must have been received from the intestate himself. 4 How. 356.—It may therefore be defined to be an *irrevocable gift, by a parent*, in his life-time, to his child, on account of such child's share of his estate after the parent's decease. 6 Watts, 87.

Questions of advancement depend on the intention of the parent; and of this the declarations of the parent at the time, or the admissions of the child, at the time or afterwards, would seem to be evidence. 6 Wh. 370. If there be no evidence at all on the subject, reference must be had to its amount and character.—*Ibid.**

In general, if a father takes a conveyance in the name of a child unprovided for, it is held to be an advancement. 4 S. & R. 333.

Where a testator, who had lent money to a son-in-law, afterwards made his will, and bequeathed his estate among his children equally, and died, and afterwards the son-in-law died—*Held*: the legacy to the daughter could not be defeated by evidence of the declarations of the testator made after the will, that the money lent to the son-in-law was to be considered part of the legacy. 10 Watts, 54.

A provision by settlement in consideration of the child's marriage, or voluntary, is an advancement *pro tanto*. 2 P. Williams,

*Entries made in a book, by the father, though without the knowledge of the child, of advancements to such child, are competent evidence to charge the latter. 6 Watts, 86. But if he afterwards makes a will, it becomes then a question, depending on the will and other testimony *de hors*. *Ib.* 257.

Thus where a testator made the following provision in his will, respecting his children—"Each to be charged in the distribution with what I have given them, or shall have given them at the time of my death, and with which I have charged them in my book, and in my foregoing will and testament"—on an issue to ascertain the truth and validity of certain entries in the testator's books—*Held*: such entries were not conclusive, and it was competent to enquire of a witness, who had made entries in the book; whether certain sums therein charged had actually been charged; and also that evidence of the testator's admission, that the charges were excessive, was admissible. 5 Watts, 80.

440; 2 Vern. 638. It may not only be of land, but a charge on land; and it may be contingent. 2 P. Wms. 441; Toller, 377-8. But the contingency must be such as to arise within a reasonable time.—*Ib.* 178.—And such contingent provision may be valued and brought into hotch-pot—2 P. Wms. 435—or the court may order that if the contingency happen, the portion shall be so distributed as to make the rest of the children equal with the child so advanced. *Ib.* 446.

§ 5. A father may confer many benefits on a child which shall not be considered an advancement—as small sums of money, a gold watch, wedding attire, money expended for the maintenance and education of the child, or laid out for his travels, &c. 3 P. Wms. 317; 2 Dess. 127.

Where a father whose estate appeared on settlement to exceed \$120,000, and who had four children, had bought furniture for a daughter, on her marriage, to the amount of \$1132, and it was proved that he declared he had given the furniture to her as a gift—*Held*, this was no advancement. 6 Whart. 370.

If a parent makes advancements to one or more of his children, and afterwards makes his will, disposing of the whole of his estate among his children, without taking any notice of the advancements, it is conceived, that each child may claim what is given to him, without deducting such advancements. 10 Watts, 57.

A debt from a child to a parent, barred by the statute of limitations, cannot be converted by the parent into an advancement, by his declarations to that effect, without the assent of the child. 4 Whart. 130.

A loan or payment by the father to his child, may be considered as a debt and not an advancement, though no security be taken.—*Ibid.* And where such money is charged by the parent with interest, it will be a debt.

And even where it was proved that the decedent had declared that the bonds of his sons-in-law were not to be paid, but merely held as evidence of advancement, and that he meant to do with all his children in like manner—*held*, this would not convert the debt into an advancement. 1 Watts & Serg. 390.

§ 6. It is only in case of intestacy, that a child, advanced by a parent, is entitled to an equal distribution with the other children, on throwing his share into the common stock. 1 Browne's R. 311.

§ 7. It has already been seen that a widow derives no benefit from hotch-pot, but takes her distributive share of her husband's property, without the advancement being brought in. *Ante*. p. 413. In North on Probates, p. 216, in note, it is said this rule is founded on the phraseology of the English statute directing the advancement to be brought into hotch-pot, "*with the other children*"—and that as our statute directs it to be brought into hotch-pot "*with the whole estate, descended,*" the English rule excluding the widow, cannot apply to cases of distribution in this State.—In support of this view, see 8 Ves. 51, 64.

By the English law, an advancement by the mother, could not, under the act, be brought into hotch-pot—the words of the English act limiting the rule to cases of "intestacy of the father;" but as our statute refers to cases of a "person dying intestate," it is considered by Mr. North that the English rule is altered by our statute.

This may be a correct view, with the exception however of cases where the "person dying intestate," is the *father*. In such case it is difficult to conceive why a provision made by the mother to a child should be brought into hotch-pot in the distribution of the father's estate. See North on Probates, 216, citing 2 P. Wms. 356.

§ 8. An advancement in lands, made by a father to a child, is to be estimated according to its value, at the time of its advancement, and not at the time of the father's death. 1 S. & R. 422. So, where the advancement is of the personal estate. *Ibid*.

§ 9. The Orphan's court is generally the proper tribunal for settling questions of advancement; yet its jurisdiction is not exclusive. In an action by the children or grand-children to recover a distributive share, the Supreme court has a right to entertain such questions. 5 Rawle, 213.

§ 10. Any person entitled to the distribution of an intestate's estate, may at any time after the expiration of 12 months from granting the letters of administration, petition the Probate court of the

proper county,* setting forth his claim:† whereupon, it shall be the duty of the court to grant a rule on the administrator or administrators, to make the distribution agreeably to law. But no administrator or administrators shall be compelled to make distribution at any time, until bond and security be given by the person entitled to distribution, to refund a due proportion of any debts or demands which may afterwards appear against the intestate, and the costs attendant on the recovery of such debts. How. & H. 406.

§ 11. A refunding bond is necessary, before the estate has been settled, but not after such settlement. It is a condition precedent. 4 Sm. & M. 625.

In a suit for distribution or a legacy, before the estate is settled, the petition must allege that a refunding bond with security has been tendered; or if after settlement, must aver that the estate has been settled;—without one or the other, the distributee cannot sue. 2 How. 808. 972; 1 Sm. & M. 546. And if entitled at all, the complainant may have a decree for *immediate* distribution, and it is error to permit the administrator to retain possession of the property for the purpose of gathering the growing crop. *Ibid.* See ante. pages 196, 199.‡ As to the position, in regard to the estate, of judgment creditors, see 7 How. 224.

§ 12. Where a distributee purchases property at an administrator's sale, the Probate court may decree the amount of his purchase, to be deducted from his distributive share of the estate. 1 How. 275. And such distributee is likewise liable to the administrator. *Ibid.*

*All the claimants must be parties to the petition. 7 How. 106; 2 Sm. & M. 30. Widow and heirs may join. 7 How. 188. As to joint parties generally, see *Ibid.* Where there is danger of waste, a remainder-man only has a remedy for his ultimate security. 7 How. 425—But see How. & H.—where certain acts work a forfeiture of the life-tenant's estate. As to husband and wife, see 4 How. 224, and *Ib.* 311. Legacies are choses in action, and if joint, remain so till distribution. *Ib.* 39, 311.

†The petition must set forth, the condition of the estate, a sufficient lapse of time to entitle the petitioner to distribution, and what is the character of all the estate. 2 Sm. & M. 30. Also, the time at which letters were granted. *Ibid.*

‡An administrator cannot charge an estate with advances made to the heirs till the debts are paid. 1 How. 275.

The personal property of a deceased debtor in the hands of a distributee, after distribution made, is liable to the satisfaction of a judgment obtained against an administrator. 1 How. 207.

§ 13. Any person entitled to a legacy or any estate by will, shall be entitled to the provisions of the foregoing act. (See sec. 10, *ante*.) Provided that nothing herein contained shall be so construed as to compel any distributee to give bond and security as aforesaid, for his or her distribution of the estate of any intestate, after a final settlement shall have been made by the administrator or administrators. How. & H. 406.*

§ 34. Any person having a legacy bequeathed in any last will or testament, may sue for and recover the same at common law. How. & H. 411. See *ante*. p. 196, 199.

§ 15. When any person or persons having a legacy bequeathed in any last will and testament, shall sue for and recover the same either at law, it shall be the duty of the Judge of the court or jury, as the case may be, to give judgment in case of a decree of the court, and a verdict in case of a trial by jury, for ten per cent. damages, in addition to the interest now allowed by law, upon the amount of money so recovered or decreed, and also upon the worth of property in case of a specific legacy. How. & H. 421.

The above rule as to damages, in case of a recovery, shall apply to suits by distributees against administrators, and wards against guardians. How. & H. 421.

See title "Legacy," p. 196, 199.†

*See note *ante*. sec. 11. As to actions for legacies, see *ante*. p. 196, 199. As to doctrine of legacies, see *ante*. p. 169, 196.

All personal estate, undisposed of, and which by lapse, or void bequest for illegality, does not pass as directed by the testator, goes to the residuary legatee. 1 Sm. & M. Ch. R. 591. Otherwise, as to the real estate. 1 Sm. & M. 60.

A suit for a legacy must be brought against the executor or administrator in the jurisdiction having cognizance of the will—1 Sm. & Marsh. Ch. 495—except where the subject of the legacy is traced to the possession of the heir in a different jurisdiction. *Ibid*.

A specific legatee, may by our statute, (in Mississippi,) maintain a suit at law, without the assent of the executor. 2 Sm. & M. 527.

The children of a decedent cannot bring any action for his personal property, without administration—and even against an administrator they cannot join the same action for their distributive shares. 14 S. & R. 110. But if the property came into the hands of a third person, who acknowledged that he held it in trust for the children, they may, by their guardian, maintain a joint action, for money had and received, without administration. *Ibid*.

†Where a balance remains in the hands of executors, the Orphan's court may decree a distribution, without an action at law. 17 S. & R. 31.

§ 16. When any person by last will and testament shall devise his or her real estate, or any part thereof, to two or more devisees, not ascertaining the metes and boundaries of each devisee's share, any of whom being under age, such devisees may apply to the Probate court of the county, in which the said last will and testament was proved and recorded;—and the said court on application of any one of the said devisees, may order a division thereof, to be made agreeably to the true interest and meaning of the said last will and testament. And each devisee's share shall be ascertained by three or five disinterested freeholders to be appointed by the court; and the report made thereon by them, or a majority of them, under their hands and seals to the next Probate court, after such division shall be made and approved by the said court and entered on the records thereof, shall be *conclusive* on all the parties concerned.* And when the real estate of any person dying intestate shall descend to two or more children, or other heirs of such intestate, one or more of whom being under age, the said court, on application, may order and direct a division of such real estate, agreeably to the law of descents, the metes and bounds of each heir's share to be ascertained by three or five disinterested freeholders, to be appointed as aforesaid, whose report, or that of a majority of them, returned, approved and recorded as aforesaid, as in the case of devises, shall be *conclusive* on all parties concerned; and in either case, the report of said freeholders

*When the real estate is incapable of division, the Judge of Probate may assign part or the whole, to some of the heirs, to hold as tenants in common, they consenting to take in that manner. 7 Pick. 209. On return of the commissioners, the court must make a decree of distribution, and not merely accept the report. *Ibid.*

A distribution, of a decedent's estate by distributors appointed by the heirs and devisees, is illegal; and a promise by one of the heirs to pay a sum of money in consideration thereof, is without consideration and void. 3 Day, 260.

A testator devised the south half of the farm to A., and the north half to B., without specifying the divisional line, or appointing any one to fix it—the court of Probate can legally order a division. 7 Connt. 21.

Where A. died intestate, seized of land on which was a mill in full operation, on a division of the land (under the Maryland act of descent,) the mill was on the portion allotted to B., and the dam on the portion allotted to C.—*Held*: B. might use the mill and dam, in like manner as the intestate did, in his life-time. 5 Har. & John. 82.

The reversionary interest of the heirs of a deceased person in lands in which his widow has an estate in dower, may be the subject of distribution among those heirs, during such widow's life. 9 Connt. 225.

shall be returned under oath—Provided, that the devisees or heirs, or the guardian of such as are under age in this State, and *not applying* for such division, shall have such notice of the time and place of the meeting of said freeholders, for the purpose of making the said division, as the court shall direct. How. & H. 412.*

§ 17. The Probate court shall order a division of personal estate among heirs or legatees in the same manner and subject to the same regulations as are prescribed for the partition of real estate among them. And the commissioners appointed for that purpose, shall be commissioners for the division of both real and personal estate. How. & H. 415.†

§ 18. Where lands, tenements or hereditaments, shall descend from a person dying intestate, and an equal division thereof cannot conveniently be made, it shall be lawful for the court of Chancery or the Orphan's court of the county by which the administration to the estate of the intestate was granted, to direct the *sale* of such lands, tenements or hereditaments, and the distribution of the money arising therefrom,‡ according to the rights of each claimant. How. & H. 409. See title "Partition."

*In the partition of an estate among heirs and devisees, notice must be given to all parties interested, or they will not be bound by the acts of the court making partition. 1 How. R. 380.

†A bill or petition for the division of real estate of an ancestor, cannot be joined with an application for the distribution of the personal estate in the hands of an administrator, by a co-heir. It has been held bad, for its multifariousness in demanding several matters of distinct natures. 1 How. 130.

‡Where an executor is directed by the will of his testator to sell the real as well as the personal estate, and to distribute the surplus, after payment of debts, among legatees, he may assign the bonds taken for the property sold, to the persons entitled to distribution, and be discharged as to so much—the bonds appearing to have been well secured when taken, and to remain due from responsible persons at the time of such assignment. 4 Munf. 360.

Where land is decreed to one heir by order of the Orphan's court, the purchase money due to the others is a lien on the land; but a release by the heirs of one of those heirs, who is dead, is binding on all but creditors. 7 S. & R. 43. See also 16 Mass. 122; 7 Pick. 209. So, where mortgage is directed. 11 S. & R. 325.

Where a testator directed land to be sold, and certain legacies to be paid out of the proceeds—*Held*: the surplus went to the heir, and not the executor or next of kin. 9 S. & R. 424.

Where land assigned by commissioners was not included in the estate of the decedent, the court will order the report to be set aside, as well as the division—more than three months, (the time limited in N. J.) after such report was allowed. 2 South. 554.

CHAPTER LXI.

PARTITION.

§ 1. Any person being a coparcener, joint tenant, or tenant in common, in any tract or tracts of land, within this State, may at any time apply to a Judge of the Supreme court, the Chancellor of the State, or the presiding justice of the county court, of any county in this State, wherein such lands may lie, for a partition of such tract or tracts of land; whereupon the said judge, chancellor or justice, shall ascertain the number of equal shares or parts, in which such tract or tracts were, or at the time of such application, are held by the original coparceners, joint tenants, or tenants in common, and shall nominate three respectable freeholders, not interested in the said land, as commissioners to make partition of such tract or tracts, into as many parts or shares as the same was originally held; and the said judge, chancellor or justice, shall thereupon order an advertisement to be inserted in one of the public newspapers of this State, and in such other public newspapers or places as the judge, chancellor or justice aforesaid, shall direct, for two months successively, prior to the day mentioned in said advertisement, on which the commissioners are to be appointed, in the form, and to the effect following:

“By — esquire, judge of the supreme court, chancellor of the state, or presiding justice of the county court, of the county of —, (as the case may be) notice is hereby given, that on application to me, by — of —, who claims an undivided — part of all that tract of land, (giving a description of the tract or tracts intended to be divided)—I have nominated A. B., C. D., and E. F., commissioners, to divide the said tract (or tracts) of land into equal shares or parts; and unless proper objections are stated to me, at — on the — day of — next, the said A. B., C. D., and E. E., will then be appointed commissioners, to make partition of the said lands, pursuant to an act entitled ‘an act

concerning the partition of lands held by coparceners, joint tenants, and tenants in common.'

"Given under my hand, this — day of —."

§ 2. If no objection be made before the said judge, chancellor, or justice, (as the case may be,) on the day appointed by him for the purpose, to the persons nominated as commissioners, then the said judge, chancellor, or justice shall, in writing under his hand and seal, appoint the persons so nominated to be commissioners, to divide the said land pursuant to the directions prescribed in this act; and the said judge, chancellor, or justice shall, in the said writing, describe the tract or tracts to be divided, and direct the number of parts or shares into which the same is to be allotted; and if objection be made to the persons nominated as commissioners, or any of them, the said judge, chancellor, or justice, shall then proceed to hear and determine such objection; and in case he find it well founded, then he shall appoint, under his hand and seal, other fit and disinterested persons, in the room of such as he may think proper to reject. Acts, 1822—How. & H. 354.

§ 3. The commissioners so appointed, before they proceed to the execution of the powers and authority vested in them by this act, shall be severally sworn or affirmed, before a judge of the supreme court, the chancellor, a justice of the county court, or a justice of the peace of the county, that they will honestly, faithfully and impartially make the partition intended, and perform the duties, trust and services, required of them by this act, to the best of their skill, knowledge and judgment. *Ibid.*

§ 4. The commissioners shall cause a survey to be made in their presence, of the tract or tracts to be divided, and shall then proceed to divide the same into the number of parts or shares directed by the said judge, chancellor, or justice, in the writing containing their appointment, each part or share to contain one or more lots, as the commissioners may think proper, they having due regard in the partition to the situation, quantity, quality, and advantages, of each part or share, so that they may be equal in value, as nearly as may be; and if the bounds of any tract or tracts, so to be divided, shall be controverted, the commissioners

are hereby directed, if such controverted part is valuable, to separate the same from the part not controverted, and make partition of the tract or tracts, in such manner that a proportion of the controverted part may be allotted to each share, as well as a portion of the part not controverted. And the said commissioners, previous to the said survey, shall administer an oath or affirmation to the surveyor and chain-bearers, that they will well and truly perform their respective duties honestly and impartially; which oath or affirmation any one of the said commissioners is hereby empowered to administer. Acts, 1822—How. & H. 354.

§ 5. The said commissioners shall number the several parts or shares laid off by them, from number one, progressively; and shall, in the same manner, number each lot in the several shares, if the same contain more than one lot; and shall make a true field-book, specifying the bounds and numbers of each lot, and also a map or maps of the tract or tracts on which the several lots or shares shall be laid down and numbered; and shall keep an exact and particular account of the time expended in the execution of their duties, and of the money due for the same; and also of all expenses accrued for surveying or otherwise, agreeably to the directions of this act. And the said commissioners shall, thereupon, give notice by advertisement in manner aforesaid, for three weeks successively, that on a certain day, (not less than one month from the date of such notification,) and at a place therein named, attendance will be given, and an allotment by ballot take place, of the several lots or shares of the tract or tracts therein described, to the original coparceners, joint tenants, and tenants in common, their heirs or assigns. How. & H. 355.

§ 6. On application made to the said judge, chancellor, or justice, by any one of the parties to the partition intended to be made, the said judge, chancellor, or justice, shall attend at the time and place specified in the advertisement of the commissioners, and shall, with the assistance of the said commissioners, proceed to allot the several parts or shares of the tract or tracts intended to be divided, in the manner hereinafter mentioned; but if no application be made to the said judge, chancellor, or justice for his attendance, then the said commissioners shall, on the day

appointed for the purpose, proceed in a public manner to number as many tickets as there are shares of land marked on the map, which shall be put in a box; and the names of the original coparceners, joint tenants, or tenants in common, shall be put in separate tickets in another box, when a person appointed by the said judge, chancellor, or justice, or commissioners, shall proceed to draw a ticket of the names, and then a ticket of the numbers, and so proceed until all the tickets are drawn; and the share on the map bearing the number of the ticket drawn next after drawing the ticket with the name, shall be the separate and divided share of that original coparcener, joint tenant, or tenant in common, his or her heirs or assigns, in the land so divided; of which balloting the said judge, chancellor, or justice or commissioners, shall make a full and ample certificate, under his or their hands and seals, specifying particularly the time, place, and manner of balloting, and the said allotment of the shares. How. & H. 355.

§ 7. The said judge, chancellor, or justice, or commissioners, are hereby authorized, as the case may require, to issue his their precept or precepts, under his or their hands and seals, commanding such person or persons, who are able to give any necessary information, to come before him or them, when and where he or they may direct, to testify by oath or affirmation, such acts, matters or things, as it may be necessary for the said judge, chancellor, or justice, or commissioners, to investigate, in the execution of the trust, duties, and services, required of them by this act, and to bring with him or them, all such patents, surveys, maps, records, deeds, or other writings, as may be necessary to be examined by said judge, chancellor, or justice, or commissioners.—How. & H. 355.

§ 8. The commissioners shall transmit the writing containing their appointment, and oath or affirmation, properly certified by the person administering the same; and the map, and field-book, and also their accounts, to the judge, chancellor, or justice, from whom they received their appointment, or in case of his death, resignation, or removal, then to any other judge, chancellor or justice, of the same court, who, after inspecting the

same, shall order the said instruments, excepting the account of the expenses, to be recorded in the clerk's office of the circuit court, or in the clerk's office of the county court, where the lands lie, which shall be good evidence of such partition; which partition shall be as valid and effectual in law to divide and separate the said lands, as if the same had been made on writs of partition, according to the course of the common law. How. & H. 356.

§ 9. The said judge, chancellor, or justice, shall be allowed for the services required by this act, at the rate of two dollars and fifty cents per day each, while employed in the said business; and the said commissioners at the rate of two dollars per day each, and the said surveyor at the rate of four dollars a day, and the chain-bearers and witnesses at the rate of one dollar per day each, while employed or attending on said business. How. & H. 356.

§ 10. In case of the death, resignation, neglect, or refusal, of any of the commissioners appointed by virtue of this act, before the trust, duties and services, hereby required of them, shall be completed, then the said judge, chancellor, or justice, or in case of his death, resignation or removal, any other such judge, chancellor, or justice, shall by writing, under his hand and seal, appoint another commissioner or commissioners, who shall be vested with the like powers and authority as if he or they had been originally appointed. How. & H. 356.

§ 11. After the said judge, chancellor, or justice, shall have ascertained the whole expense of such partition, he shall divide the same equally according to the several parts or shares, which shall be paid by the persons to whom such shares were allotted, their heirs or assigns, within four weeks after the same shall be ascertained; or in default of payment of such expense, the said judge, chancellor, or justice, is hereby authorized, where no other property is to be found, to direct a sale to be made by the commissioners, of so much of those parts or shares deficient in paying the expense, as will be sufficient to pay their respective proportions thereof, together with the expenses accruing on such sale; and the said judge, chancellor, or justice, shall direct the same to be sold by the said commissioners, at public auction, to the high-

est bidder, whereof four weeks' notice shall be previously given, in one of the said newspapers, and at three of the most public places in the county in which the lands lie: and the said commissioners' deed to the purchaser shall pass as good a title for the separate enjoyment of the same, as if all the owners and claimants of shares of the entire tract divided had joined therein.—How. & H. 356.

§ 12. If partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and shall be subject to debts, charges, curtesy or dower, or transmissible to executors or administrators, and be considered, to every other intent and purpose, in the same manner as if such deceased joint tenants had been tenants in common. How. & H. 357.

§ 13. Any coparcener, joint tenant, or tenant in common, who shall be dissatisfied with any partition made according to the provisions of this act, may have the same re-examined by bill in equity in the superior court of chancery, and the court, on the final hearing of the cause, may either affirm the proceedings of the commissioners, or decree a new partition by other commissioners, in like manner, if it shall satisfactorily appear that injustice was done to the complainant in such cause. How. & H. 357.

§ 14. Nothing herein shall be construed so as to injure, prejudice, defeat or destroy, the estate, right or title, of any person or persons, claiming such tract or tracts of land, or any part thereof, or any thing therein by title, under any other person or persons, or by title paramount to the title of such coparceners, joint tenants, or tenants in common, among whom partition may have been made. How. & H. 357.

§ 15. The powers and jurisdiction heretofore invested in the presiding justices of the several county courts of this state, by an act entitled an "An act concerning the partition of land held by coparceners, joint tenants, and tenants in common," passed the 10th June, 1832, shall pertain to and be invested in the judges of probate of the several counties of this state, and all proceedings and matters which by virtue of said act were required to be recorded in the clerk's office of the county court, shall be regularly

recorded in the office of the clerk of the probate court of the counties respectively where such proceedings shall be had; and all business which was pending and unfinished before such justices of the county court, at the time when the said court and its officers were superseded, shall be, and the same shall be deemed to have been regularly transferred to the cognizance and jurisdiction of the judges of probate of the respective counties, for final adjudication. How. & H. 471.

§ 16. Whenever it shall be represented, to the satisfaction of any probate court of any county of this state, by the parties interested in any lands held in joint tenancy, in common or coparcenary, that an equal division thereof cannot be made, on account of the nature and situation thereof, such court shall have power to order and direct a sale thereof, upon such terms as may appear reasonable, and that the proceeds thereof be divided in equal parts to and among the parties interested therein, and the legal representatives of a deceased party, according to their respective interests therein, subject to all the rules prescribed in the act entitled "An act concerning the partition of lands held by coparceners, joint tenants, and tenants in common," passed 16th of June, 1822. Acts 1833, 2d ses. ch. 9, sec. 1.

CHAPTER LXII.

JUDGE AND CLERK OF PROBATE COURT.

§ 1. There shall be established in each county of this state, a Court of Probates, to be styled "The Probate Court of the county of ———," with such jurisdiction to said courts within their respective counties as is prescribed to them in the aforesaid article of the Constitution. *Post. sec. 25—ante. p. 8.*

§ 2. The Judge of Probate and clerk for such county, shall be chosen by the electors of their county, qualified to vote for members of the legislature, at the place for holding the general elections in such county, and shall hold their offices for the term prescribed by the constitution, unless sooner removed for misconduct in office, or other disqualifying cause provided for by the constitution.

§ 3. Before entering upon the duties of their respective offices, the judge of probate and clerk of said court in every county of this state, shall take and subscribe the oath prescribed in the constitution before any judge, justice of the peace, or other officer lawfully authorised to administer an oath, which oath, when thus taken and subscribed, shall be recorded on the minutes of the court. On failure or refusal to take said oath within twenty days after his election, any judge of probate or clerk thus failing or refusing, shall be deemed disqualified under the said election, to hold the office for which he was elected, and the vacancy shall be filled in the same manner with other vacancies in said offices; and the clerk of the court of probate of each county in this state, shall, before he enters upon the duties of his office, enter into bond payable to the governor of the state of Mississippi, and his successors in office, in the same manner, in the same penalty, and with the same condition as is required of registers of orphans' courts, by the fourth section of the ninth chapter of the Revised Code: which bond shall be recorded and filed as is prescribed by said section. *Post. sec. 31.*

§ 4. The court of probate in each county shall procure a seal for said court, which shall be kept by the clerk thereof, and shall be affixed to all letters testamentary, of administration and guardianship; to all certificates of the court or of the clerk, and to every writ and process of every kind issued from the court.

§ 5. All vacancies, either in the office of judge or clerk of said court, shall be filled by election at the several precincts of the county, to be held at such time as the board of county police may prescribe, and on such public notice as may be provided for by law.

§ 6. It shall be the duty of the present register of the orphans' court to deliver over when demanded, to the clerks of the courts of probate, books, records, papers, and all other matters pertaining to the office of register, and on failure or refusal so to do, any register so offending, shall be fined in the sum of one thousand dollars, to be collected before any court of competent jurisdiction, and paid into the county treasury for county purposes. (Obsolete.)

§ 7. The judges of probate and clerks of the courts of probate, shall receive the same compensation and perquisites as are allowed to the judges of probate and registers of the orphans' court in the respective counties.

§ 8. In case the clerk shall be at any time unable, from sickness or other unavoidable causes, to attend said court, it shall be lawful for the judge of probate to appoint a person to act as clerk pro tempore, who shall take an oath faithfully to discharge all the duties of his office; and for services rendered by the said clerk, he shall be entitled to the fees allowed by law to the clerk of said court.

§ 9. The court of probate shall make allowances of all sums necessary for furnishing the clerk's office with book-presses and tables, to be paid out of the county treasury of the proper county.

§ 10. All deeds, mortgages, and other instruments of writing, now required by law to be recorded in the county courts of this state, shall hereafter be recorded in the courts of probate of the respective counties, and the clerks of said courts of probate are authorised and required to do and perform all acts in relation

thereto, which are now authorised and required to be done by the clerks of said county courts. The clerks of the several county courts shall deliver over to the clerks of the courts of probate of the respective counties, all books, records, and papers, belonging to said county courts, so far as they appertain to the jurisdiction of said court of probate under the constitution and laws of this state, which said books, records, and papers, shall be kept and preserved by said clerks of the courts of probate, and they are authorised and required to do and perform all acts in relation thereto, which are now authorised and required to be done by said clerks of the county courts. The clerks of the courts of probate are hereby authorised and required to do and perform all acts which are now authorised and required to be done by the clerks of the county courts and registers of the orphans' court, not inconsistent with the constitution and laws now in force in this state.

§ 11. All the suits, causes, and proceedings whatever, which may be pending in either the county and probate court, or the probate or orphans' court, in relation to the matters properly belonging to the probate court, under the constitution, at the time this act takes effect, shall be, and the same are hereby transferred to the probate court of the proper county, there to be proceeded in and conducted according to law.

§ 12. So much of the act entitled "An act to reduce into one the several acts concerning last wills and testaments, the duties of executors, administrators and guardians, and the rights of orphans and other representatives of deceased persons," passed November twenty-sixth, one thousand eight hundred and twenty-one, as is now in force, and all subsequent existing acts in relation to the duties, powers, and jurisdiction of the orphans' court, be, and the same are hereby extended to the courts of probate, so far as the same are not repugnant to the constitution, or do not conflict with the provisions of this act. *Ante. sec. 1.*

§ 13. All the powers and jurisdiction heretofore conferred upon the county and probate courts of this state, and which have not been expressly repealed, and are not repugnant to the constitution of this state, be, and the same are hereby conferred upon the several courts of probate within this state, so far as the same relate to orphans' business, or testamentary matters, and that all

civil suits which were pending in any of the county courts and undetermined, shall be transferred to the circuit courts of the proper county, for final trial. Sec. 1.

§ 14. The powers and jurisdiction heretofore invested in the presiding justices of the several county courts of this state, by an act entitled "An act concerning the partition of land held by coparceners, joint tenants, and tenants in common," passed the 10th day of June, 1832, shall pertain to, and be invested in, the judges of probate of the several counties of this state, and that all matters and proceedings, which by virtue of said act were required to be recorded in the clerk's office of the county court, shall be regularly recorded in the office of the clerk of the probate court of the counties respectively, where such proceedings shall be had; and all business which was pending and unfinished before such justices of the county court at the time when the said court and its officers were superseded, shall be, and the same shall be deemed to have been regularly transferred to the cognizance and jurisdiction of the judges of probate of the respective counties for final adjudication. *Ante. p. 434.*

§ 15. The clerks of the said courts shall have power to appoint deputies, with the approbation of their several courts, who shall take the oath of office; and, thereupon, such deputies shall have full power and authority to do and perform all the several acts and duties enjoined upon their principals. And the clerks of said courts shall keep their offices at the court-houses of the counties in which they are, or may be clerks. But, in all cases where offices have not been provided for the clerks of the said courts, such clerks may keep the records, books and papers, belonging to their offices, at such places, as the justices of the county court shall think fit, and so enter of record.

Whenever the office of clerk of any county court shall become vacant by any cause whatsoever, the records, papers, books, stationery, and every thing belonging or appertaining to said office, shall be demanded, delivered over, and received in the manner, and (in case of refusal or detention) under the penalties prescribed in the 14th section of the act entitled "An act to reduce into one the several acts, and parts of acts, concerning the establishment, jurisdiction, and powers of the superior courts of law."

If any clerk of a county court shall willingly make any false entry, or raze a letter, or change any record in his keeping, belonging to his office, every such clerk, so offending, shall, on conviction thereof, be fined and imprisoned at the discretion of the court, and shall moreover be liable to the action of the party aggrieved.

The several clerks of the county courts in this state, and their deputies, shall be, and they are hereby, empowered to administer oaths or affirmations, in all cases wherein an affidavit is necessary as the foundation of any official act to be performed by any such clerk; which affidavit shall be filed, and shall, in all respects, be as effectual as if the oath thereto had been administered by a justice of the peace. And if any person sworn by any such clerk or his deputy, by virtue of this act, shall give any evidence, under such circumstances as would have constituted the same to be perjury, if done in presence of a court of record, the same shall be deemed perjury to all intents and purposes.

§ 16. It shall be the duty of the judge of probate of each county in this state, to hold a court, at the court-house of his county, on the fourth Monday in every month, which may continue for four days, if the business to be done cannot be sooner finished; and the sheriff or coroner (as the case may require) of the county shall attend said court, and shall serve all summons or process to him directed, from the orphans' court of his or any other county within the state, and shall make returns thereof, according to the tenor of the same; and on failure he shall be liable to be proceeded against, in the same manner as for the like failure in other cases. *Post.* sec. 29.

The judge of probate in each county shall be, and he is hereby authorised, as often as he may deem it necessary, to hold a special term of the orphans' court of his county, on ten days' notice being given, by advertisement, at three public places in the county, (of which the court-house shall be one;) and at such term, no other business shall be transacted, heard or determined other than that which shall be particularly mentioned in the advertisement aforesaid.

§ 17. The orphan's court in each county shall in all cases have power to issue a summons for any person concerned in the affairs

of a deceased person, or for any witness or other person whose appearance in the said court, for any purpose, shall be deemed necessary or proper, and the said summons shall be returnable, at the discretion of the court, at some regular term thereof; and if it be necessary or proper to enforce the appearance of the party, the court, on the return of "summoned" and failure to appear, may issue an attachment; and when the party shall appear, or be brought in thereon, may fine him or her, not exceeding fifty dollars; and if a witness before the court shall refuse to give evidence, the court may commit him or her to the custody of the sheriff of his or her county, (or coroner, as the case may require,) there to remain until he or she give evidence, or be discharged according to law: and such witness shall moreover be liable to the action of the party, who may sustain any damage by reason of his or her refusing to give evidence as aforesaid.

§ 18. The appointment of an attorney and counsellor at law to the office of judge of probate, shall not deprive such attorney and counsellor at law of the right to practise in his profession in any court of law or equity in this state, except the court of which he is judge: *Provided*, that he shall not be at liberty to prosecute or defend, or in any manner advise either party, in any matter, cause or controversy which he may have decided, and on which an appeal or other proceedings are had in any other court in the state. And if any judge of probate shall aid, abet, counsel or advise in any such matter, cause or controversy, he shall be deemed guilty of a high misdemeanor, and may for the same be removed from office. *Ante.* p. 16.

Whenever there shall be so near a relation between any deceased person and the judge of probate of the county in which letters testamentary or of administration have been or ought to be granted, according to the provisions of this act, as between father and son, by nature or marriage, or brother in like kind, or whenever a judge of probate shall be interested in the estate of any deceased person, as being legatee, devisee or distributee, such judge shall be disqualified to act in the settlement of such deceased person's estate, and the cognizance thereof shall appertain to the judge of probate in an adjoining county, and who resides nearest to the residence of the judge so disqualified; and the judge so

residing in an adjoining county, shall in every such case have full authority to proceed to a final settlement of the estate of such deceased person, and shall cause his proceedings therein to be recorded in the register's office of the county from which such case shall have been removed. *Ante.* p. 16.

§ 19. Any person who has been, is, or may hereafter be, elected to the office of judge of the probate court of any county in this state, and who shall, at the time of his election, be executor, administrator, or guardian, in such court, and not having settled his final account thereof, shall be disqualified from acting as judge of probate in such cases; but it shall be his duty to apply to the probate judge of an adjoining county, who shall have full authority to proceed therein, and shall cause his proceedings thereon to be recorded in the clerk's office of the probate court of the county from which the same shall have been removed. *Ante.* p. 16.

§ 20. And it shall be the duty of said register to keep and preserve all records, files, papers and proceedings of the said court; to record all last wills and testaments duly proved and approved; all accounts finally allowed; all inventories and appraisements duly made and sworn to; to issue all citations, subpoenas and other process as issue of course; and all such as are directed by the court in term time, or the judge in vacation; and to do and perform all those things that appertain to the office of a register of the said orphans' court. And the said register's office shall be under the direction of the court in term time, and of the judge in vacation.

§ 21. The board of police of Hinds county is authorised to appoint one or more fit person or persons to transcribe, in large, well bound books, such of the records of deeds of conveyance, mortgage, trusts, and to uses, as, in the opinion of said board, are in danger of loss or destruction, by reason of their present condition, and thereupon to make out in a like book or books, a general index to all the deeds of conveyance, &c., records for said county since the commencement, referring to each deed or instrument by the grantor or alienor; and also by the name of the grantee, or alienee, or trustee, and that such transcript of the records, when made and collected to the satisfaction of the said board, or of the

judge of said probate court, shall have all the force and effect of the original record.

The said board of police be authorised to appropriate out of the said moneys of said county, a sufficient compensation for the services aforesaid, as well as for the books that shall be needed.

The said board of police shall have power to appropriate and order to be paid out of the moneys of said county, a just compensation to the clerk of the said probate court, for making, or causing to be made, a suitable general index to the minutes, orders, proceedings, records, files, and proceedings of and concerning decedents' estates, and the property and estates of the minors, idiots and lunatics therein, under the name of each decedent, ward, idiot or lunatic, respectively, shall appear in one place of the index, successive references to such minutes, orders, &c.; such index, when completed, to be subject to the approval of said board of police, or the judge of said probate court.

The provisions of this act be, and the same are hereby extended to the county of Yazoo.

§ 22. All courts of probate shall be held in the several counties laid off and organized at this session of the legislature, four terms in each and every year, at the place of holding circuit courts in the respective counties, on the first Mondays of April, July, October and January, in each and every year, and may, at each term thereof, continue four judicial days, if business so long require, and no longer. Sec. 24, 16, 29.

§ 23. It shall be lawful, from and after the passage of this act, for the judge of the probate court of said county to hold his courts in the office built by said county for the use of the probate court.

§ 24. The court of probate shall be holden, in the counties hereinafter named, at the times hereinafter mentioned:—in the county of Attala, on the first Monday of each and every month, and continue two days, if business so long require, and no longer; in the county of Bolivar, on the third Mondays of January, April, July and October, and may continue two days, if business so long require; in the county of Carroll, on the first Monday in each and every month, and may continue three days, if business so long require; in the county of Choctaw, on the fourth Monday in each

and every month, and may continue three days, if business so long require; in the county of Clarke, on the first Mondays of December, March, June and September, and may continue four days, if business so long require; in the county of Coahoma, on the second Mondays of January, April, July and October, and may continue two days, if business so long require; in the county of De Soto, on the first Monday of each and every month, and may continue two days, if business so long require; in the county of Lafayette, on the second Monday in each and every month, and may continue two days, if business so long require; in the county of Marshall, on the fourth Monday in each and every month, and may continue three days, if business so long require; in the county of Noxubee, on the first Monday in each and every month, and may continue two days, if business so long require; in the county of Neshoba, on the third Monday in each and every month, and may continue one day, if business so long require; in the county of Oktibbeha, on the fourth Monday of each and every month, and may continue three days, if business so long require; in the county of Ponola, on the third Monday of each and every month, and may continue two days, if business so long require; in the county of Tallahatchee, on the second Monday in each and every month, and may continue three days, if business so long require; in the county of Tippah, on the first Monday of each and every month, and may continue two days, if business so long require; in the county of Tunica, on the first Mondays in the months of January, April, July and October, and may continue two days, if business so long require; in the county of Tishomingo, on the first Monday in each and every month, and may continue two days, if business so long require; in the county of Winston, on the first Monday in each and every month, and may continue one day, if business so long require; in the county of Yallabusha, on the first Monday in each and every month, and may continue three days, if business so long require; in the county of Leake, on the second Monday in each and every month, and may continue one day, if business so long require; in the county of Lowndes, on the first Monday in each and every month, and may continue six days, if business so long require,

and no longer; in the county of Lauderdale, on the third Monday in each and every month, and may continue three days, if business so long require. Sec. 30, 22, 16.

§ 25. The powers belonging to the county and probate courts, prior to the constitution of 1832, were transferred by act of 1833, to the probate court, and are set forth in the act of 1824, as follows:

That the judge of probate and the justices of the county courts now in commission, or any two of them, shall hold county and probate courts, in their respective counties, four times each year, in the same manner and at the time specified by law. And it shall be the duty of the judge of probate of the several counties in this state, to report all his judicial proceedings to the county and probate court of his county, on the first day of every term thereof: and it shall be the duty of the said county and probate court to examine and consider all such proceedings of the judge of probate, and to make such order thereon as they may deem right and proper, not contrary to law. And the judge of probate and the associate justices of the county court in such county, shall be entitled to receive out of the county treasury of their respective counties, the sum of three dollars per day for every day they may actually be engaged in holding any regular or special term of said county and probate courts; and the judge of probate shall receive the same compensation for holding his regular monthly orphans' court. And the clerks of the county courts now in office shall be the clerks of the said court.

All letters of administration, letters testamentary, and of guardianship, which may be granted or issued by the judge of probate, at any other time, than during the regular sessions of the county and probate courts, shall be valid, unless on motion of any person or persons interested therein, the county and probate court for good cause shown, shall revoke the same.

No allowance shall be made to any executor or administrator for the management of any estate, but by the county court of his county, which then, on the final settlement of such estate, shall not be less than one, nor more than ten per centum, on the appraised value thereof.

Sections 4, 5, 6 and 9, relate to civil suits and other matters exclusively appertaining to the county court proper.

Section 7 has reference to the probate court.

§ 26. All process, orders and decrees of the probate court, shall be enforced, executed and returned in the same manner, and under the like penalties as the process, orders and decrees of a circuit court of the state are enforced, executed and returned.—Act, 1821, Revised Code, chap. 9, sec. 3. See *ante*. p. 24, sec. 10, act 1846—See sec. 28.

§ 27. The perquisites of the judge and clerk of probate as fixed by act of 1824, and the act of 1844 amendatory thereof, (slightly altered by the act of 1846, hereto annexed,) are as follows:

Judge of Probate.

For examining and allowing each claim against any estate of a deceased person,	12½
For examining, reporting and stating each account of an executor, administrator, guardian or collector, for the first sheet	1 00
Every sheet more than one,	37½
For each order for advertising, issuing citations, or other notice of process,	50
For each order for the partition of real estate among heirs and devisees,	50
For each order for the appointment of commissioners, on the representation of an estate being insolvent,	75
Apportionment of an insolvent estate among creditors,	1 00
Granting letters testamentary, or letters of administration or guardianship,	75

Clerk of the Probate and Police Courts.

For like services performed by them, the same fees as are by law allowed to the clerks of the circuit court.	
For recording each deed or other conveyance, for each hundred words,	10
For issuing tavern license and taking bond,	1 00
For copy of tavern rates and certificate thereof,	50
For certifying the official acts of a justice of the peace, or other certificate with seal,	37½

For registering the probate of any will or testament, and for letters testamentary thereon,	1 00
For recording a will, testament, or codicil, for every hundred words,	10
For administering oath to executors, administrators or guardians, taking bond and recording the same,	1 00
For recording an inventory, appraisement, or account of executors, administrators, collectors or guardians, for every hundred words,	10
For issuing marriage license, taking bond and recording marriage certificate,	1 00
For making up final record, furnishing copies of records, transcripts, recording deeds, and all other writing, and instruments required by law to be recorded and copied, or of which any person is entitled to demand or receive copies, ten cents for each hundred words. See sec. 28.	

By act of 1846, the clerk of the board of police, (i. e. the clerk of probates, sec. 31, *post.*) shall receive \$1.50 per day during each session of the board of police, and court of probates, in the counties of Itawamba, Scott, Winston, Choctaw, and Lawrence; and the clerk of probates of Jasper county shall receive \$2 00 per day, during such session.

The judges of probate in Itawamba, Scott, Lawrence, Greene, Winston, Perry, Jones, and Covington counties, shall receive \$1.50 per day, and of Jasper county \$2.00 per day, payable out of the treasuries of their respective counties. Session acts, 1846, pp. 213, 214.

By same act, it is provided, that so much of the act of 1844, as reduced the fees of clerks in the counties of Covington, Wayne, Jones, Clarke, Greene, Jackson, Hancock, Perry, Marion, Washington, Adams, Jefferson, and Rankin, is repealed, and the fees authorised before the act of 1844, are (in those counties,) re-established. Session acts, 1846, p. 248.

§ 28. By act of 1826, it is made lawful for the clerk of any probate court to issue execution for the costs of any suit or proceeding which may originate in said court, which the said judge and clerk of probate may by law be entitled to. Act, 1826, ch. 66, sec. 2.

By act of 1833, ch. 62, sec. 7, the judges and clerks of probate are allowed the same compensation and perquisites which are allowed to the judges of probates and registers of orphans' courts, in their respective counties. See *ante*. sec. 27, for list of fees and perquisites.

§ 29. Besides the duties and powers of a judge of probate under the foregoing provisions, he may take proof or acknowledgment of deeds and conveyance, whether the land be within or without his county. How. & H. 368.

He may solemnize the rites of matrimony between any free persons, in this state, duly licensed according to law. *Ibid*. 327.

He may authorise a minister of the gospel in term time, on the production of his credentials of ordination and communion, to solemnize the rites of matrimony.

He has, *pro tempore*, all the powers, and is subject to all the duties of the trustees of schools and school lands, in any township where the inhabitants fail or refuse to appoint trustees therefor. Acts 1842, sec. 3, ch. 17, p. 132.

He must be present when the jury is drawn by the clerk of the circuit court and sheriff in vacation, when the same has been omitted in term time. How. & H. 491.

He is required to approve or disapprove of the bonds of the sheriffs in the several counties, for the collection of taxes. Act 1844, ch. 18, sec. 2, p. 130.

By act of 1841, ch. 87, p. 237, *the judge of probate*, clerk of the circuit court, and president of the board of police of *Holmes* county, are authorised to contract for transcribing certain loose papers, which when signed by the judge of probates, shall have the force and effect of a record, compensation for which is to be made by the board of police. Act 1841, ch. 87, p. 237.

§ 30. By act of 1841, the time of holding probate court in Hancock county, is made the *first* Monday in January, March, May, July, September, and November.

And by act of 1842, fixes the time of holding the probate court in Lauderdale county, on the first Monday of every month; repeals the act of 1830, which fixed it on the *third* Monday of every month. Act of 1842, ch. 89, p. 217.

By the same act, the act of 1830, fixing the time of holding the probate court in Pike county, is repealed. Act 1842, ch. 85, p. 214.

By the same act, the probate court of Marion county is directed to be held on the *third* Monday of March, May, July, September, November and January, and to continue only three days. Act of 1842, ch. 100, p. 229.

The same act directs the probate court of Harrison county to be held four times a year, on the fourth Mondays of February, May, August and November, and may continue four days each term, if business so long require, and no longer. Act of 1842, chap. 81, p. 211.

The same act directs, that in addition to the terms, now provided by law, for holding the probate court of Pontotoc county, it may be held on the first Monday of each and every month, if, in the opinion of the judge of said court it may be necessary. *Ibid.* sec. 4.

The terms of the probate court are appointed by law to be held in the county of

Adams—on the fourth Monday of every, and may continue six days in the months of December, January, February and March; four days in the months of April, June, October and November; and two days in the months of May, July, August & September. Act of 1828.

Amite—on the fourth Monday of every month, and may continue four days. Act of 1836.

Attala—on the first Monday of every month, and may continue two days. Acts, 1838.

Bolivar—on the first Monday of every month, and may continue two days. Acts, 1838 and 1840.

Carroll—on the first Monday of every month, and may continue three days. Acts, 1838.

Chickasaw—on the fourth Mondays of January, April, July and October, and may continue four days. Acts, 1836.

Choctaw—on the 4th Monday of every month, and may continue three days. Acts, 1838.

Claiborne—on the 4th Monday of every month, and may continue four days. R. Code, c. 9, sec. 5.

- Clarke**—on the 1st Mondays of December, March, June and September, and may continue four days. Acts, 1838.
- Coahoma**—on the 4th Mondays of January, April, July and October, and may continue two days. Acts, 1844.
- Copiah**—on the 3d Monday of every month, and may continue two days. Acts, 1840. ¹
- Covington**—on the first Mondays of January, March, May, July, September and November, and may continue two days. Acts, 1833.
- De Soto**—on the first Monday of every month, and may continue two days. Acts, 1838.
- Franklin**—on the 3d Monday of every month, and may continue four days. R. Code, c. 9, sec. 5. Acts, 1830.
- Greene**—on the 4th Monday of every month, and may continue four days. R. Code, c. 9, sec. 5.
- Hancock**—on the fourth Mondays of January, March, May, July, September and November, and may continue four days. *Ibid.* Acts, 1827.
- Harrison**—on the fourth Mondays of February, May, August and November, and may continue four days. Acts, 1842.
- Hinds**—on the 4th Monday of every month, and may continue six days. R. Code, ch. 9, sec. 5. Acts, 1844.
- Holmes**—on the first Monday of every month, and may continue four days. Acts, 1836.
- Itawamba**—on the first Monday of every month, and may continue two days. Acts, 1842.
- Jackson**—on the 4th Monday of every month, and may continue four days. R. Code, c. 9, sec. 5.
- Jasper**—on the first Monday of every month, and may continue two days. Acts, 1844.
- Jefferson**—on the 4th Monday of every month, and may continue four days. R. Code, ch. 9, sec. 5.
- Jones**—on the 2d Mondays of April and October, and may continue three days. Acts, 1844.
- Kemper**—on the first Monday of every month, and may continue four days. Acts, 1833 & 1844.
- Lafayette**—on the 3d Monday of every month, and may continue two days. Acts, 1844.

- Lauderdale—on the first Monday of every month, and may continue three days. Acts, 1838 & 1842.
- Lawrence—on the 4th Monday of every month, and may continue four days. R. Code, ch. 9, sec. 5.
- Leake—on the 2d Monday of every month, and may continue but one day. Acts, 1838.
- Lowndes—on the first Monday of every month, and may continue six days. Acts, 1838.
- Madison—on the 4th Monday of every month, and may continue six days. R. Code, ch. 9, sec. 5. Acts, 1844.
- Marion—on the third Mondays of March, May, July, September, November and January, and may continue three days. Acts, 1842.
- Marshall—on the 4th Monday of every month, and may continue three days. Acts, 1838.
- Monroe—on the first Mondays of January, April, July and October, and may continue four days. Rev. Code, ch. 9, sec. 5.—Acts, 1838.
- Neshoba—on the 3d Monday of every month, and may continue one day. *Ibid.*
- Newton—on the 4th Monday of every month, and may continue four days. R. Code, ch. 9, sec. 5.
- Noxubee—on the first Monday of every month, and may continue two days. Acts, 1838.
- Octibbeha—on the 4th Monday of every month, and may continue three days. *Ibid.*
- Perry—on the 4th Monday of every month, and may continue four days. R. Code, ch. 9, sec. 5.
- Pike—on the fourth Monday of every month, and may continue four days. *Ibid.*
- Panola—on the 3d Monday of every month, and may continue two days. Acts, 1838.
- Pontotoc—on the 4th Monday of every month, and may continue four days. R. Code, ch. 9, sec. 5. In addition to these, terms may be held on the first Monday of every month, if deemed necessary by the judge. Acts, 1842.
- Rankin—on the 4th Monday of every month, and continue four days. R. Code, ch. 9, sec. 5.

Scott—on the first Mondays of January, April, July and October, and may continue four days. Acts, 1833.

Simpson—on the 2d Mondays of February, April, June, August and October, and may continue two days. *Ibid.*

Smith—on the 1st Mondays of January, April, July and October, and may continue four days. *Ibid.*

Tallahatchie—on the 2d Monday of every month, and may continue three days. Acts, 1838.

Tippah—on the first Monday of every month, and may continue two days. *Ibid.*

Tishamingo—on the first Monday of every month, and may continue two days. *Ibid.*

Tunica—on the 1st Mondays of January, April, July and October, and may continue two days. *Ibid.*

Warren—on the 4th Monday of every month, and may continue four days. R. Code, ch. 9, sec. 5.

Washington—on the 4th Monday of every month, and may continue four days. *Ibid.*

Wayne—on the 3d Mondays of January, March, May, July, September and November, and may continue four days. *Ibid.*

Wilkinson—on the 2d Monday of every month, and may continue four days. Acts, 1833.

Winston—on the 1st Monday of every month, and may continue one day only. Acts, 1838.

Yallobusha—on the first Monday of every month, and may continue one day only. *Ibid.*

Yazoo—on the 4th Monday of every month, and may continue four days. R. Code, ch. 9, sec. 5.

§ 31. The condition of the bond of the clerk of probates, is faithfully to discharge the duties of his office, and seasonably to record all last wills and testaments, and other instruments of writing required by law to be recorded in his office, in a well bound book or books to be kept for that purpose; and safely to keep all books, papers, records, tables, presses, and other things appertaining to his office, and safely deliver such books, papers, and other things to his successor in office;—which bond shall be re-

recorded in the office of the Secretary of State. And the said bond shall not be void on the first recovery, but may be put in suit and prosecuted from time to time, until the whole sum of the penalty (\$2,000,) be recovered. Act 1840, ch. 84.

The said clerk has power, and is required by law, to issue marriage licenses; to take the bond, security, and receive and record the testimonials incident thereto. Acts, 1822—R. Code, ch. 29, sec. 5. To issue licenses to hawk, and peddle goods, wares and merchandise. How. & H. ch. 8, sec. 21. To issue licenses to persons dealing in gold and silver, bank notes, and bills of exchange. Acts, 1841, ch. 43. To record the marks and brands of cattle. How. & H. 201, sec. 13. To keep the notarial records of notary publics and other officers, after the expiration of their term of office. Act 1822, R. Code, ch. 47, sec. 5. To act as clerk in trials before justices of the peace, for forcible entry or unlawful detainer, and to issue all process resulting therefrom. Acts 1829, R. Code, ch. 39, sec. 10. And finally, to take the acknowledgment or proof of deeds and other instruments of writing, whether the lands conveyed lie in or out of his own county. Acts, 1833, ch. 3, sec. 3, December session. And to record the bonds of all county officers, in a book to be kept for that purpose. Acts, 1844, ch. 18, sec. 1.

The clerk of probate is also, *ex officio*, clerk of the board of police. By the 20th section of the 4th article of the constitution of 1832, it is provided that "the clerk of probate shall be clerk of the board of county police;" and by the act of 1833, ch. 62, sec. 10, he is authorised and required to do and perform all acts which were required to be done by the clerks of the county courts and registers of the orphans' courts, "not inconsistent with the constitution and laws now in force."

It is the duty of the clerk of the board of police to keep and preserve a correct entry of all the proceedings and orders of said board, and to make an entry upon his minutes of the attendance of each member thereof. The clerk of said board, before he enters upon the duties of his office, shall enter into bond with two good securities, to be approved by the board, in the sum of two thousand dollars, payable to the governor and his successors in

office, conditioned that he will faithfully execute and perform the duties of his office, and safely keep all records, books and papers pertaining thereto, and will deliver the same over to his successor when required; which said bond shall be recorded by said clerk on the records of said board, and shall be filed by the president thereof in the office of the secretary of state, and may be put in suit by any person aggrieved by the malfeasance of said clerk in his office, and shall not be void on the first recovery, but may be sued upon until the entire penalty shall be recovered, and a certified copy thereof shall be received as evidence in any court of justice in this state. Acts, 1833, chap. 1, sec. 6. p. 457.

The clerks of said boards of police, shall have power to appoint deputies, with the approbation of said boards, who shall take the oath of office; and thereupon, such deputies shall have full power and authority to do and perform all the several acts and duties enjoined upon their principals. And the clerks of said boards shall keep their offices at the court-houses of the counties in which they are, or may be clerks. But in all cases where offices have not been provided, for the clerks of the said courts, such clerks may keep the records, books and papers, belonging to their offices, at such places, as the members of the board of police shall think fit, and so enter of record. Acts, 1822, R. Code, ch. 11, sec. 6.

Whenever the office of clerk of any board of police shall become vacant by any cause whatsoever, the records, papers, books, stationery, and every thing belonging or appertaining to said office, shall be demanded, delivered over, and received in the same manner, and (in case of refusal or detention) under the penalties, prescribed in the 14th section of the act, entitled "An act to reduce into one the several acts, and parts of acts, concerning the establishment, jurisdiction, and powers of the superior courts of law." *Ib.* sec. 8. Sec. 6, p. 442.

If any clerk of a board of police shall willingly make any false entry, or raze a letter, or change any record in his keeping, belonging to his office, every such clerk so offending shall, on conviction thereof, be fined and imprisoned at the discretion of the court, and shall be moreover liable to the action of the party aggrieved. *Ib.* sec. 9.

The several clerks of the boards of police in this state, and their deputies, shall be, and they are hereby empowered to administer oaths or affirmations, in all cases where an affidavit is necessary as the foundation of any official act to be performed by any such clerk; which affidavit shall be filed, and shall in all respects, be as effectual as if the oath thereto had been administered by a justice of the peace. And if any person sworn by any such clerk or his deputy, by virtue of this act, shall give any evidence, under such circumstances, as would have constinted the same to be perjury, if done in presence of a court of record, the same shall be deemed perjury to all intents and purposes. *Ibid.* sec. 10.

All process shall be tested in the name of the president of the board of police of the county within which the same may issue, and bear test on the first day of the term next preceding that to which the same may be made returnable; and the clerk issuing the same, shall mark thereon the day on which it shall be issued, and the sheriff or other officer receiving the same, shall mark thereon in like manner, the day he shall have received it; and every clerk, sheriff, or other officer neglecting so to do, shall forfeit and pay the sum of one hundred dollars, to be recovered by action of debt in any court of record having cognizance thereof, with costs, by any person who shall sue for the same. All original process, and all subsequent process thereupon, to bring any person or persons to answer to any action, suit, or cause in any board of police, (subpœnas for witnesses excepted, which may be issued in term time, and made returnable immediately,) shall be issued and signed by the clerk of such board, with the seal of office thereto affixed, and shall be returnable on the first day of the term next succeeding that at which the same shall bear test, and shall be executed at least five days before the return day thereof; and any writ or process, except as aforesaid, which shall issue within five days before the commencement of the term of any court, shall be made returnable to the term next after that to be held within five days as aforesaid, and not otherwise; and all writs and process issued, made returnable or executed in any other manner, or at any other time than is hereinbefore directed, may be abated upon the plea of the defendant. *Ib.* sec. 17.

The said board shall have control over all the proceedings in the clerk's office, during vacation, and may correct any mistake or errors which may have happened therein, and may for good cause shown, set aside any of the proceedings, and make such order concerning the same as may be just and right; and may also, for good cause shown, reinstate any suit or action discontinued during such vacation. *Ib.* sec. 20.

When any appeal shall be granted on any judgment or decision of a board of police, the clerk of such board shall immediately make up a full and perfect record of all proceedings in such cause, and shall on the application of either party, give to such party an attested copy of such record, with a taxation of all costs which have accrued therein, and shall endorse on such copy the day on which the same was demanded, and the day on which it is delivered, and sign his name as clerk thereto; and if by reason of the neglect or delay of any clerk to give a transcript of a record in any cause as aforesaid, the same shall not be filed in the circuit court in due time—or if the record be incorrectly or erroneously made up, so that the circuit court cannot proceed thereon to trial and final decision—such clerk shall in either case, upon conviction thereof, before any court of competent jurisdiction, be adjudged guilty of a misdemeanor in office, and shall be fined in a sum not exceeding one hundred dollars, to the use of the party entitled to such attested copy, and shall moreover be entitled to an action on the case for all damages which such party may sustain by reason of such neglect or delay. *Ib.* sec. 25.

For preventing errors in entering the judgments of said boards of police, the members thereof, before any adjournment, shall cause the minutes of their proceedings to be publicly read by the clerk, and corrected, where necessary, and then the same shall be signed by the president, or in his absence, by any one of the members then sitting: which minutes so signed shall be carefully preserved among the records; and no proceedings or judgments of any board of police shall be of force, or valid, until the same be so read and signed. *Ib.* sec. 28.

The said boards shall, once in every year, appoint one or more of their own body, to examine into the condition of the clerk's office of such county, who shall make a report to the board dur-

ing the term at which such appointment shall be made, specifying therein the state in which the papers, books, records, and proceedings, belonging to said office, are found; and if it shall appear by such report; that any clerk has neglected to record any deed, or other instrument of writing, proper to be recorded in his office, within a reasonable time after the same shall have been lodged with such clerk, to be recorded, or has failed to make out and keep a correct index to the matters recorded in each and every book, or has neglected to keep in regular order all the papers belonging to his office, keeping every document in its proper file, and the papers of each suit together, or has neglected to have complete records made up in due form, in all causes in which a final judgment may have been rendered, within three months after the judgment in such cause: in every such case, the clerk so offending, shall be deemed guilty of a misdemeanor, and may, for the same, be removed from office; and shall moreover, be liable to any party injured, for all damages which may be sustained by the default or negligence of such clerk. *Ib.* sec. 33.

It shall be the duty of the clerk of each board of police within this state, to procure for the use of their boards respectively, a seal with the style of the board around the margin thereof, and an eagle in the centre, unless the same be already provided: and the sum necessary to procure such seals, shall be paid out of any money in the treasury of the proper county, not otherwise appropriated. *Ib.* sec. 43.

The boards of county police of the several counties in this state are hereby authorised and requested to make such an allowance to the clerks of said boards, for extra services, as the said boards may in their discretion think proper to make, payable out of the county treasuries of said counties, any law or laws to the contrary notwithstanding. Acts, Dec. 1833.

Accounts allowed by the board of police shall be recorded by the clerk in a book to be kept for that purpose, and the claimant shall receive a warrant on the county treasurer, signed by the clerk, with the seal of office thereto affixed, for the amount allowed; and the clerk shall number the warrants issued as aforesaid, in each year, beginning in the term first held in each year and progressing through the same in numerical order, and register

the number and amount of each warrant in the aforesaid book, and transmit to the auditor of public accounts, annually, the numbers, amounts, and names of claimants of all such warrants, and an abstract of the items or services, for which the said warrants were issued; and the result of the said account shall be entered in the books of the auditor of public accounts, and the amount thereof laid before the legislature annually, with his other accounts. The said clerk is authorised to issue his warrant on the county treasury of his county for any allowance made by said board, which the treasurer is authorised to pay out of any money in the treasury not otherwise appropriated. Acts, 1822, ch. 11, sec. 44. Acts, 1833, ch. 1, sec. 29.

The boards of police, respectively, shall make allowances of the sums of money necessary for supplying the clerk's offices with books, tables, presses, to be paid out of the county treasury of the proper county. Acts, 1822, ch. 11, sec. 42.

The clerk of the board of police is required by law to deliver, within ten days from the date of the appointment of any overseer of a road, a copy of the order to the sheriff of the county, under the penalty of five dollars; and also to fix up in his court-house, once in every year, a list of the names and precincts of all the overseers of roads in his county, under the penalty of ten dollars for each neglect. It is also his duty to furnish the grand jury, on the first day of the term of each circuit court, with a complete list of all the overseers of public roads in his county, clearly setting forth the time of the appointment of each overseer, and the portion of the road he is required to keep in order. Acts, 1833, ch. 1, sec. 34. Acts 1836, p. 91.

The said clerk is required by law to make out a list of such additional assessment as the collector shall make of property omitted to be assessed by the assessor, and to transmit the same to the auditor of public accounts, by the 17th day of February in each and every year, under a penalty of one hundred dollars, for which he shall be allowed a fair compensation, at the discretion of the board. He is also required to make out two certified copies of the report of the commissioner appointed to value and classify lands, one for the tax collector, and the other for the auditor of public accounts. For each and every return of the classification

and assessment of land, made and certified to the auditor as aforesaid, a compensation not exceeding fifty dollars, at the discretion of the board of police, shall be allowed said clerk, payable out of the treasury of the county. And he is likewise required to certify and transmit to the auditor of public accounts, the accounts of insolvencies and delinquencies allowed to the collectors of taxes in his county, and to post up at the door of the court-house a certified copy of the list of such insolvencies and delinquencies, under the penalty of not less than fifty, nor more than one hundred dollars. Acts 1844, ch. 1, sec. 33, 36.

It is the duty of the clerk of the board of police to issue licenses to persons to keep inns and taverns, to exhibit and sell victuals, vinous, spirituous and other liquors, for the accommodation of persons; and provender and other sustenance for horses and cattle, and licenses to keep boarding houses within their respective counties, in the manner prescribed by law, the applicants for such license having first been recommended to said board, and said clerk first taking bond and security in the form and penalty prescribed by law. Acts 1822, R. Code, ch. 72, sects. 1, 2, 3. And on the application of any person to said clerk in the recess of said board of police, with the recommendation required by law, and on entering into bond, with security, as aforesaid, and depositing with such clerk the amount of tax assessed for such licenses, and the fee for issuing the same, the said clerk shall issue a certificate of deposit, by which the said applicant shall be authorised to open and keep an inn or tavern, until the next succeeding board of police, when, if approved, a license shall be issued for one year from the date of the deposit; and if not approved, a due proportion of the deposit shall be refunded. *Ibid.* sec. 12. And it is the duty of the said clerk, on the first day of the term of the circuit court of his county, to furnish the said court with a list of the persons who have obtained licenses to keep inns and taverns, and houses of private entertainment, and to retail spirituous liquors, within one year next preceding such court: and every clerk neglecting such duty, shall be deemed guilty of a contempt of court, and may be fined in any sum not exceeding fifty dollars. *Ib.* 19. And when any license shall issue in the recess of the said board of police, the said clerk may renew the same on application, as

in the case of an original license. *Ibid.* sec. 24. The said clerk is also required by law to issue licenses to retail vinous and spirituous liquors, whenever the same shall be granted by said board, and the applicants shall give bond as required by law. Acts, 1841.

By act of 1846, it shall be the duty of the clerk of the probate court to make out two certified copies of the return of the assessor of his county, one of which he shall deliver to the tax collector of the county, and the other shall be forwarded to the auditor of public accounts, by the 15th of November following. Act 1846, ch. 1, sec. 24.

By the same act, it is made the duty of the secretary of state to have prepared and furnished to the several clerks of probate in this state, a uniform standard of weights and measures, as soon as practicable, according to the provisions of the act of Congress, establishing a uniform standard of weights and measures for the United States. Sec. 1.

And it shall be the duty of the several clerks of probate to give notice, by advertisement in at least five public places in his county, one of which places shall be at the court-house, of the reception of such standard of weights and measures, and requiring a compliance with the provisions of this act. Sec. 2.

Sections 4 and 5 makes owners or proprietors of grist-mills, cotton-gins, grocers and factors, and others vending by measures, and failing and refusing, within six months, to have their weights and measures tested by this standard, and *branded by the clerk as correct*, liable to a fine of \$50, and to presentment or indictment.

Section 5 authorises clerks to establish agencies at different places in their respective counties, to carry into effect the provision of this act; and such clerk, or agent, shall receive the sum of 37½ cents for testing or branding each measure or set of weights, as required by (sects. 3 & 4 of) this act. Act 1846, ch. 42, pages 214, 215.

CHAPTER LXIII.

GUARDIAN AND WARD.

§ 1. Any father, even if he be not twenty-one years of age,* may by deed in his life-time, or by his last will and testament, either of them being executed and recorded, according to law, grant or devise the custody and tuition of his child, (which had never been married,) although it be not born, during any part of the infancy of such child, to whomsoever he will; and such grant or devise, heretofore or hereafter to be made, shall give the grantee or devisee, the same power over the person of the child, as a guardian in common socage hath, and authorise him by actions of ravishment of ward, or trespass, to recover the child with damages for the wrongfully taking or detaining of him or her, for his or her use, and for the same use to undertake the care and management, and receive the profits of the ward's estate, real and personal, and prosecute and maintain any such actions and suits, concerning the same as a guardian in common socage may do. How. & H. 335.

§ 2. Every guardian so appointed, shall, before he exercises any authority over the minor, or his estate, appear before the orphans' court of the proper county, and declare his acceptance of the guardianship, which shall be recorded, and shall give bond and security as hereinafter directed, for the faithful execution of his office, unless it is otherwise directed by such deed, or last will and testament. *Ibid.*

§ 3. If any such guardian shall fail or neglect to appear in the orphans' court of the proper county, and give security as aforesaid, within three months after his right to the guardianship shall have accrued, he may be summoned and compelled to declare

*In England, an infant may devise the guardianship of his child by virtue of stat. 12, Cha. II.—and it has been contended that such a disposition will draw after it the land as incident to the guardianship; but this has not been determined. 3 Lomax, 8, citing Vaugh. 177; 2 P. Wms. 102.

his acceptance or renunciation of such trust; and if any guardian appointed as aforesaid, being summoned, shall fail to appear, or shall appear and renounce the same, which renunciation shall be recorded, the said court may and shall proceed to appoint and qualify some other person or persons to the guardianship. How. & H. 336.

§ 4. The orphans' court in any county of this state, shall have power to appoint guardians to orphans, under the age of fourteen years—*Provided*, none shall have been appointed by deed, or last will and testament of the father of such orphan, according to the provisions of this act. And where no guardian shall have been appointed, by deed or last will and testament as aforesaid, or in case the person so appointed shall renounce the trust, or fail to give security, the said court shall have power to allow orphans of the age of fourteen years or upwards, to choose guardians of their own election, which shall be done by petition to said court, signed and acknowledged by the orphan in presence of the judge of probate, or some justice of the peace of the proper county, and recorded by the register of the orphans' court; but if such orphan shall elect a person, other than the natural guardian, the court shall have power, at discretion, to appoint such natural guardian, in lieu of the person so chosen by such orphan. And if any orphan of the age of 14 or upwards, shall fail to appear and choose a guardian as aforesaid, the said court shall cause a citation to issue to such orphan, to appear at the next term, and elect a person for his or her guardian; and in default thereof, or if the guardian so chosen, shall refuse the trust, or fail to give good and sufficient security, the said orphans' court shall have the same power to appoint a guardian to such orphan, as if he or she were under the age of 14 years, giving the preference in all cases to the natural guardian, or next of kin, if any such apply for the guardianship, and tender the proper security, unless such applicant be manifestly unsuitable to take the management of the person and estate of such orphan. *Ibid*.

A stranger cannot move for a revocation of letters. 1 How. R. 295. The minor ward on marriage is entitled to her estate. 2 How. R. 893.

§ 5. Every guardian appointed by the court or otherwise, (except where no security is required by deed or last will and testament, before he shall have authority to act as such,) shall enter into bond to the judge of probate, and his successors in office, in such penalty, and with such securities, as the court shall approve; and such bond shall be recorded, and be subject to be put in suit, and be, in all respects, on a footing with the bond given by an executor or administrator; and the form of the condition of it shall be as follows:

“The condition of the above obligation is such, that if the above bounden ———, as guardian to ———, of ——— county, shall faithfully account with the orphans’ court of ——— county, as directed by law for the management of the property and estate of the orphan under his care, and shall also deliver up the said property, agreeably to the order of the said court, or the directions of law, and shall, in all respects, perform the duty of guardian to the said ———, according to law, then the above obligation shall cease: it shall otherwise remain in full force and virtue in law.” How. & H. 337.

§ 6. On a guardian’s executing such bond, the court shall have power to order the land, distributive share or other property belonging to such orphan, to be delivered to such guardian immediately, or at such time, as shall appear reasonable; in case of a legacy or bequest, the court shall direct the delivery as soon as it shall appear that the same may be delivered without prejudice to the person administering; and in case of a distributive share, the court shall direct the delivery as soon as the same shall be ascertained; and on failure of any former guardian appointed by the court, or of an executor or administrator, to comply with such order, his bond may be put in suit, and he may also be attached, fined and imprisoned for contempt of court. *Ibid.*

§ 7. Every testamentary or other guardian shall, within three months after his appointment and acceptance of such office, deliver into the office of the register of the orphans’ court, an inventory, on oath, of all the estate, real and personal, which he shall have received, or taken possession of, to be entered of record, and shall exhibit once in every year and oftener if there-

unto lawfully required, an account of the product of the said estate, and of the sale and disposition of such product, and disbursements; which accounts being examined and audited by the judge of probate, in the same manner as executors or administrator's accounts, and reported fairly stated, and supported by vouchers, and approved by the court, shall be recorded in the register's office.

Any guardian who shall not deliver in such an inventory, or render such an account, shall, by order of the orphans' court, to which he is answerable, be summoned, and if he remain in default, his bond may be put in suit, and a new guardian appointed. And the said court may, for any good and sufficient cause, displace a guardian; giving such guardian fourteen days' previous notice, by citation, to appear and show cause why he should not be displaced. How. & H. 337.

§ 8. No guardian shall commit waste on the lands, tenements, or hereditaments of his ward, but the court may, on his application, allow him to cut down and sell wood, and account for the same, in case it shall deem the same advantageous or necessary for the ward's education and maintenance. And any guardian having real estate under his care, shall either cultivate the same, with the slaves, stock and utensils, belonging to the ward or to be purchased with his or her money, with the approbation of the court, or he shall lease the same from year to year, or for any term not exceeding three years, and within the non-age of the ward: or he may, with the approbation of the court, undertake the estate on his own account, and be answerable for the annual value, which annual value shall be ascertained under the direction of the court. And every guardian shall account for all profit and increase of the estate, or annual value as aforesaid, and shall not be answerable for any loss or decrease sustained without his fault, to be allowed by the orphans' court. *Ibid.*

§ 9. The orphans' court shall ascertain at discretion, and settle the sum to be expended annually in the maintenance and education of orphans, having regard to the future situation, prospects and destination of the ward; and the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate, and may order the sale of such part of the

personal estate, as may be necessary for the purpose aforesaid; and if the personal estate and the rents and profits of the real estate, be not sufficient for the maintenance and education of the ward, the orphans' court, on full investigation thereof, may, from time to time, order the guardian to sell such part of the ward's lands, tenements and hereditaments, as it shall direct and judge adequate to his or her maintenance and education. How. & H. 338.

§ 10. The lands, tenements, and hereditaments so ordered to be sold, shall be advertised by the guardian in three of the most public places in the county, and in some public newspaper in this state, for the space of forty days previous to the time appointed for the sale thereof; and the guardian, at the time and place so advertised, shall sell the same at public vendue upon a credit of twelve months, after the day of sale, to the highest bidder, who shall give bond with satisfactory security for the amount thereof; and such guardian shall make report in writing of his proceedings thereon, to the next orphans' court after such sale: *Provided*, that the said guardian may adjourn the said sales from time to time, at his discretion. And said guardian shall make a deed to the purchaser or purchasers for the lands, tenements and hereditaments so sold; which deed shall vest in the purchaser or purchasers, as good and perfect an estate, in the premises therein mentioned, as the ward was seized of, or entitled to at the time of making the said order. *Ibid.*

§ 11. Every account of a guardian shall state his expenditures in maintaining and educating the ward, not exceeding the income of the estate, unless allowed by the court; and for no balance of money in his hands shall he be charged interest, unless he shall consent to take the same on interest; but the court may direct him to place the same at interest, taking bond to the orphan, with security approved by the court; and for the trouble and care of such guardian, the court may allow any commission not exceeding ten per cent. *Ibid.*

§ 12. The orphans' court, if it be informed, or have cause to suspect, that the sureties of a guardian, or any of them, are in failing or dubious circumstances, may require and compel such guardian to give additional surety or sureties; and if he refuse

or neglect so to do, may displace him, and appoint a new guardian. How. & H. 338.

§ 13. The powers and duties of every testamentary or other guardian, over the person and estate of the ward, shall cease and determine when such ward shall either arrive at the age of 21 years, or be lawfully married; and in either event, the guardian shall forthwith render a final account of his guardianship, to the orphans' court, and shall deliver up, agreeably to the order of said court, to the said ward, (or to the husband, as the case may require,) all the property of such ward, in his hands, including bonds and other securities, and on failure he shall be liable to an action on his bond, and to fine and imprisonment for a contempt of said court. *Ibid.* 339.

§ 14. The orphans' court of each county in this state is hereby authorised and empowered, in their respective counties, on request made by the friends or relations of any idiot, lunatic or person *non compos mentis*, or by the overseer of the poor, for the district in which such idiot, lunatic or person *non compos mentis* resides, by writ to direct the sheriff of the said county to summon twelve good, discreet and lawful men of the county, and neighborhood of the residence of such person to make inquisition thereto on oath; and if the person said to be an idiot, lunatic or *non compos mentis*, shall be adjudged, by such inquest (or a majority of them) to be incapable of taking care of himself or herself, they shall certify the same under their hands and seals to the orphans' court, and the said orphans' court shall appoint some suitable person or persons to be guardian or guardians to such idiot, lunatic, or *non compos mentis*; directing and empowering such guardian or guardians to take care of the person and estate, both real and personal, of such idiot, lunatic or *non compos mentis*. And the said guardian or guardians shall make a true and perfect inventory of the said estate, and return the same, within the same time, and account with the orphans' court as often, and in the same manner as guardians to orphans are before directed by this act, and shall give bond and security in like manner; and the said court shall have the same power and control over such guardian or guardians, to all intents and purposes, as over guardians to orphans. *Ibid.*

§ 15. It shall be the duty of such guardians, to improve frugally, and without waste or destruction, the estate of the idiot, lunatic, or person *non compos mentis*, and apply the income and profits thereof to the comfortable maintenance and support of such idiot, lunatic, or *non compos mentis*, and of his household or family, (if any there be,) and the said guardian or guardians are hereby empowered to collect, sue for, and recover, all just debts due to such idiot, lunatic, or *non compos mentis*; and they shall also be subject to the payment of all just debts owing by such person, which were contracted when he or she was of sound mind, and before his or her lunacy or distraction, out of the personal estate, or if that be insufficient, then out of the real estate, in such way and manner as executors and administrators may by law discharge the debts of deceased persons, when the personal estate of the testator or intestate is insufficient. And the said guardian or guardians shall have the same power and authority, by order of the orphans' court, to sell the lands, tenements, and hereditaments of any idiot, lunatic, or *non compos mentis*, for the purpose aforesaid, as by this act is given to executors or administrators, in similar cases, observing the same rules and restrictions; and the deed or deeds of conveyance of such guardian or guardians, shall have the same force, effect, and validity, to all intents and purposes. How. & H. 339. See p. 294 to 298.

§ 16. If any such idiot, lunatic, or *non compos mentis*, shall be restored, to the use of his or her reason, and sanity of mind, (and the same be made to appear to the orphans' court, who shall judge thereof,) on application to said court, the residue and remainder of his or her estate, both real and personal, shall be returned and delivered to him or her, the guardian or guardians having such reasonable allowance, for their care, charge and trouble, as the court shall order. *Ibid.* 340.

§ 17. In all cases where letters of guardianship shall hereafter be granted, the person or persons to whom the same shall be granted, shall take an oath faithfully to discharge the duties of their office, which oath shall be administered by the judge of probates at the time of granting letters of guardianship, any law to the contrary notwithstanding. *Ibid.*

§ 18. Guardians who reside out of this state, and within any one of the United States, whose wards have estates therein, may apply to the court having jurisdiction of the matter, and file a certified copy of his letters of guardianship, under the seal of that court granting the same, giving bond in such sum, with such security as shall be required by the court to whom application is made, conditioned as the law requires; and the court shall grant to every such guardian, all the rights and privileges that are by law exercised by other guardians of this state. How. & H. 340.

Where any minor resident in any other state in the Union, shall have property, real or personal, or any effects, rights or credits in this state, and such minor shall have no guardian within this state, it shall be the duty of the probate court of the county within which such property, effects, rights or credits may be, to appoint as guardian of the estate of such minor, any fit and proper person entitled to such guardianship, who may apply for the same, on his giving bond and security as required by law of other guardians: *Provided*, at any time such appointment may be superseded by the court, on such minors appearing and making an election to the contrary, if of age to make such election: *And provided, also*, that such election may be made before any probate or county court of the county and state where such infant may reside, and being certified under the seal of said court, shall have the same effect as if he or she were personally present in court; and this act shall take effect and be in force from and after its passage. Act of 1846, p. 227.

§ 19. In relation to bastard children, it is provided that it shall be the duty of the county court to appoint a guardian or guardians to said child; and upon his, her or their entering into bond, with good and sufficient security, to be approved by the court, for the faithful performance of his, her or their duty, the money shall be paid over by the court, to such guardian or guardians. How. & H. 334.

§ 20. All the provisions contained in the 12th section of the act, entitled "An act to reduce into one the several acts concerning last wills and testaments, the duties of executors, administra-

tors and guardians, and the rights of orphans and other representatives of deceased persons,," passed November 26th, 1821, so far as they relate to appeals taken from the court established by that act, be, and the same are hereby made applicable to appeals taken from the said probate court, to the chancery court and supreme court of this state. Ante. pp. 27, 30.

The 65th section of the 9th chapter of the Revised Code of Mississippi, with all the powers and rights thereby conferred, and the duties thereby enjoined, are extended so as to embrace the sureties and bonds of guardians in the same manner that the 65th section of the above recited act extends to and embraces the sureties of executors and administrators, and the duties and powers of the orphans' court in relation thereto. *Ibid.* 418. To wit:

When sureties for executors or administrators, or their representatives, conceive themselves in danger of suffering thereby, and petition the court for relief, the court shall summon the executor or administrator, and shall have full power to order, either that the said executor or administrator shall give good counter security, or that he shall execute a new bond, with good security, in a penalty not less than the penalty of the first bond executed by him, for the faithful discharge of his duties, and payable, in like manner, to the judge of probate of the proper county, and his successors in office. And such new bond shall have relation back to the time of granting the letters testamentary, or of administration, and shall be as effectual in every respect as if it had been executed before such letters had been granted. The condition thereof shall be as follows:

"The condition of the above obligation is, that whereas the above bound _____, executor of the last will and testament of _____, deceased, (or administrator of the goods, chattels and credits of _____, deceased,) hath heretofore executed a bond payable _____, and conditioned for the discharge of his duties as executor, (or administrator,) as aforesaid, which said bond bears date the _____ day of _____; and whereas by an order of court made on the _____ day of _____, other bond and security hath been required of the said executor, (or administrator):—

now, therefore, if the said executor (or administrator) shall well and truly have kept and performed, and shall well and truly keep and perform the condition of the bond aforesaid, and shall, in all respects, have performed and shall continue to perform the duties of his office aforesaid, then this obligation to be void, otherwise it shall remain in full force and virtue." How. & H. 398. For executor, &c. insert guardian.

§ 21. It shall be lawful for any person interested in any estate, who can produce just cause to the probate court of any county in this state, that any guardian, administrator or executor is about to remove the property of any minor, or the property of any estate beyond the limits of this state, with a design of defrauding any minor, or the heirs of any estate, it shall be the duty of the judge of probate, when such application may be made, to issue a precept to the sheriff of the proper county where such application may be made, commanding the sheriff forthwith to seize the estate about to be so removed, and dispossess such administrator, executor or guardian, and to revoke the letters of any such person, and commit the administration or guardianship of any such estate to such person as the judge of probate may, in his discretion, see fit and proper. How. & H. 415.

§ 22. When any guardian, residing without the limits of this state, of any minor or minors within the age of 21 years, or of any person *non compos mentis*, shall desire to remove the property of any such minor or minors, or person *non compos mentis*, out of this state, such foreign guardian shall file in the probate court of the proper county, in this state, a petition under oath, stating that he or she is qualified and acting guardian of such minor or minors, or person *non compos mentis*, in the state or territory to which he or she desires to remove the property of such minor or minors, or person *non compos mentis*, and such foreign guardian shall file with said petition copies of his or her letters of guardianship and guardian bond, properly certified and authenticated. Act, 1846, ch. 15, sec. 1.

That upon the filing of such petition, if in term time, the court shall by order, appoint some discreet person, guardian ad litem, for such minor or minors, or person *non compos mentis*, and shall order citation to issue to such guardian ad litem, to appear and

answer said petition on a day to be named, which citation shall be served at least ten days before the return day thereof; and if said petition shall be filed in vacation, the judge of probate shall make the orders by this section of this act required, by fiat to the clerk of said court. *Ib.* sec. 2.

Upon the return of such citation executed, and upon the hearing of said petition, answer, and such proofs as may be submitted, and due deliberation had thereon, if it shall appear to the satisfaction of said court that the interest of such minor or minors, or person non compos mentis, would be promoted by the removal of his or her, or their property, out of this state, said court shall grant an order authorising such foreign guardian to remove the property of such minor or minors, or person non compos mentis, to the state in which such foreign guardian shall be qualified and acting as such guardian; and such order shall be authority to such foreign guardian to demand and receive the property of such minor or minors, or person non compos mentis, and the receipt of such foreign guardian shall be a full and perfect discharge to the person or persons having such property in possession: *Provided*, that continuances, writs of error and appeals, may be granted as in other cases. *Ib.* sec. 3.

Upon granting the order for the removal of such property, as provided for by the provisions of this act, the court shall order the letters of guardianship and guardian bond, filed with said petition, to be recorded; and such bond shall be received in evidence as other guardian bonds; and for any breach of the condition of such bond, any suit or action may be maintained and prosecuted, as on other guardian bonds in this state. *Ib.* sec. 4.

The provisions of this act shall apply to the case of any guardian appointed and qualified in this state, who shall remove out of this state, and become guardian of the same ward or wards in any other state or territory, and shall desire to remove the property of his or her ward or wards out of this state; and this act shall be in force from and after its passage. *Ib.* sec. 5.

§ 23. When, hereafter, any executor, administrator, or guardian, or other person interested in the lands, tenements, or hereditaments of any deceased person, shall suggest to the orphans' court of any county in this state, that it will be for the interest of

the devisees, heirs or other legal representatives of any such decedent, to sell the whole or any part of such lands, tenements, or hereditaments, and shall make application to any such orphans' court to order the sale of the same, it shall be the duty of such court forthwith to issue a citation directing all persons, in any manner interested in said lands, tenements, or hereditaments, to appear before the said court, at a day to be named, not less than sixty days after the time of issuing such citation, to show cause why the said lands, tenements, and hereditaments should not be sold, and it shall be the duty of the administrator, executor, guardian, or other person making such application, to advertise in two of the most public newspapers printed in the state, for a period of six successive weeks, a notice to all persons interested in such lands, tenements, and hereditaments, specifying the same particularly in said notice, to appear at the court at which such citation is made returnable, to show cause, if any they can, why said lands, tenements and hereditaments shall not be sold, and upon the return of such citation executed, if the parties to whom it is directed reside in the said state, or upon proof of such publication as aforesaid, the said court is hereby authorised and empowered, if they shall be satisfied from all the proofs exhibited, that the interest of the heirs, devisees or other persons interested in such lands, tenements, or hereditaments, will be promoted by selling the same, to order the same to be sold on such credits and terms as they shall deem most advantageous to those interested: *Provided, however*, that no such lands, tenements and hereditaments, shall be sold on a credit for a shorter time than 12 months.

The said court, at the time of ordering the sale of any such lands, tenements and hereditaments as aforesaid, shall take bond, with good and sufficient security, from the executor, administrator, guardian, or other person petitioning, for any sale, in a sufficient penalty, conditioned to apply the proceeds of said sale in the same way the lands, tenements or hereditaments would have descended, been applied or appropriated if no such order of sale had been made. How. & H. 418-19.

§ 24. From and after the passage of this act, executors, administrators and guardians be, and they are hereby, authorised to relinquish such lands, as the interest of the heirs of the testator or

intestate, or their wards may require, and with which they are charged, by virtue of their letters.

Executors, administrators and guardians are hereby authorised to apply the amount that may have been paid on such relinquished lands, to the payment of other lands, belonging to the heirs of the testator, intestate, or their ward or wards, according to the provisions of the several acts of congress, relative to the relief of purchasers of public lands.

When it shall appear to the satisfaction of the county court, that the said lands cannot be relinquished without injury to the said estate, they may direct the same to be sold.

The provisions of the 97th section of the above recited act, be extended so as to embrace the guardians of minors and persons incapable in law to manage their own estate. How. & H. pp. 416, 417. (Obsolete.)

Whenever any person shall have purchased land of the United States, and shall die before the payment therefor shall have been completed, his or her executor or administrator, shall be, and he is hereby authorised and empowered to sell by order of the orphans' court of the proper county, any property belonging to the estate of the deceased, giving public notice of the time and place of such sale, and upon such terms as shall be prescribed by the said orphans' court, and to apply the proceeds of such sale to the payment of such land: *Provided, nevertheless*, that this shall not extend to cases where the testator or testatrix shall have made provision for the payment of such land, by his or her last will and testament.

Whenever any person shall have purchased land of the United States, and shall die before the payment thereof is completed, and the personal property of said deceased, in the opinion of the orphans' court of the proper county, shall be insufficient to pay the balance due for said land, the said orphans' court are hereby vested with power and authority to grant to the executor or administrator of said deceased, an order to sell land so purchased of the United States and unpaid for, upon such terms as in the opinion of the said orphans' court will be most advantageous for said estate, and to transfer to the purchaser or purchasers the certificate for the same. How. & H. 407. (Obsolete.)

§ 25. When the estate of any deceased person, or the property of any minor or minors, shall consist of lands or other real estate, and slaves or other personal property, and the county and probate court of the proper county shall be of opinion that the interest of the said estate, or the said minor or minors will be promoted by the sale of the lands or other real estate in preference of the slaves and other personal property, the said court may, at its discretion, order the sale of said lands and other real estate, instead of the slaves and other personal property, on such credit, not exceeding four years, as the said court may be of opinion will best promote the interest of the said estate, or the interest of the said minor or minors, the purchaser giving bond and security, as required in the other cases of the sale of property of deceased persons. How. & H. 417.

§ 26. Hereafter it shall be lawful for the guardians of idiots, lunatics, and persons *non compos mentis*, to sell the real estate of such idiot, lunatic, or person *non compos mentis*, under the rules and regulations now prescribed by law for the sale of real estate by executors, administrators and guardians. How. & H. 420-21.

§ 27. When any person or persons, having a legacy bequeathed in any last will and testament, shall sue for and recover the same, either at law or in equity, it shall be the duty of the court or jury, as the case may be, to give judgments in case of a decree of the court, and a verdict if in case of a trial by jury, for ten per cent. damages, in addition to the interest now allowed by law, upon the amount of money so recovered or decreed, and also upon the worth of property in case of a specific legacy.

The above rule, as to damages in case of a recovery, shall apply to suits by distributees against administrators, and wards against guardians. How. & H. 421.

§ 28. Actions of account may be brought and maintained against the executors or administrators of every guardian, bailiff and receiver, and also by one joint tenant or tenant in common, his executors or administrators, against the other as bailiff, for receiving more than comes to his just share or proportion, and against the executors or administrators of such joint tenant or tenant in common. How. & H. 547.

§ 29. Of the several species of guardians, there are—

1st. Guardians by *nature*, the father, and (in some cases,) the mother of the child. See 2 Root, 320. At common law the father is guardian, and must account for profits to his child.

2d. Guardians for *nurture*—which are the father or mother, till the age of 14 years—(see *ante*. sec. 4, p. 467)—and for want of either, the Ordinary appoints. This species extends only to the person of the ward. 7 Wend. 354; 6 Conn. 494.

3d. Guardians in *socage*, (the kind by which our statute—sec. 1, p. 466—regulates the duties of a guardian in Mississippi,) or guardians at common law. This species of guardianship exists where the ward has some estate in lands, when, by the common law, the guardianship devolves on the next of kin, *to whom the inheritance cannot possibly descend*. Such guardianship continues only till the minor is 14 years of age.* (See sec. 13.) At the age of 14 years, a minor may choose a guardian, unless his father, (as he may do,) has appointed a guardian by testament, which constitutes, what is called—

4th. A *testamentary* guardian. Tucker's Commentaries on Blackstone, Book 1, p. 133. See *ante*. page 466.

§ 30. By the law of North-Carolina, no one has a right to the guardianship of an infant, except as testamentary guardian, or as appointed by the father by deed, or by the county or superior court—(here, the court of probate.) See sec. 4, p. 467, *ante*.

The appointment of guardian by the court, is a matter of sound discretion to the court making the appointment, and another court will not rescind the appointment without being satisfied that injury is likely to result from it, to the person or the estate of the orphan. 2 Murphy, 122.

In North-Carolina, the court is not bound to appoint as guardian the next of kin, or the person chosen by the minor above 14

*Judge Tucker says in his Commentaries, "Guardianship in socage cannot in strictness exist in Virginia; and that though the act of Assembly—1 R. C. 108, S. 1, 4—speaks of guardians in *socage*, yet the allusion to them has probably proceeded from inadvertently copying the provisions of ante-revolutionary statutes, without a due attention to the change effected by our laws. Tucker's Com. B. 1, p. 133. (Our act is a copy of the Virginia act.) If no other guardian is then appointed, this continues. 5 John. 66.

years of age, but may and ought to appoint the person, who in their discretion, they believe, will best execute the duties of the appointment. 1 Murphy, 231. Sec. 4, p. 467.

The executor has no prior right to the guardianship of the testator's child, but on the contrary is a very improper person for that trust. The mother is the natural and (when not unworthy,) the most suitable person to be appointed statutory guardian. 3 Dana, 600;* 3 Yerger's R. 336; Coxe, 397. A widow, being her late husband's executor, her child's grand-father will be appointed guardian rather than he who has married the widow. 4 Hayw. 30. If a mother while she is sole refuses to act as natural guardian, and on her refusal a guardian is appointed, she may, after her marriage and while she is *covert*, (the guardian appointed having died) accept of and undertake such guardianship. 5 Gill. & John. 27.

When the father of the minor is living, or if not and a former guardian has been appointed, the court has no right to appoint another, the first never having renounced nor been removed—6 Yerger, 458—unless the ward has reached the age of 14 years, and chooses a guardian, which of itself will supersede the first. 3 Dana, 599; 11 Ohio R. 442. (See *ante*. sec. 13, p. 471, for statute of Mississippi.) In the latter case the acts of the first are afterwards void.† *Ibid*.

The appointment by will of an executor as guardian, who acts as executor for six years, but never qualifies as guardian, and then renounces the guardianship, does not thereby render him guardian up to that time. 1 Humph. 210.

§ 31. The county court of the county in which the ward is actually domiciled, has jurisdiction to appoint a guardian for him. 3 Dana, 599. (See sec. 4, p. 467, stat. Miss.) See 2 M'Cord's Ch. R. 446.

*The mother of a bastard child is its natural guardian. At marriage it devolves on her husband, and recurs to her after his death. 2 Mass. 109.

†A county court in Virginia having appointed a guardian for an infant whose father was living, this court in comity presumes that the appointment was legal, and sustains a payment made to such guardian as a good payment to the infant. 5 Dana, 570.

An appointment without regular notice, is voidable only, and not void. 2 Aik. 394. (See sec. 4, p. 467, *ante*. law of Mississippi.)

The motion to appoint should be in writing, naming the person proposed, and stating his consent to be appointed. 3 Day, 279.*

A person having no interest in the subject, should be appointed guardian. 12 Mass. 16, 19.

§ 32. When from the facts an executor, who was also guardian, might be charged with a receipt of moneys either as executor or guardian, he must account in the *latter* character. For whatever funds he had in his hands as executor, were by operation of law, transferred to him as guardian. 2 Hill's Ch. R. 285. And as executor he may credit in his accounts the balance remaining in his hands as guardian. 2 Bailey's R. 60.

But where no change in the manner of holding appears, he will be considered as holding in the character of administrator, and the sureties on his administration bond will be liable. 1 Dana's R. 514. Yet where more than two years had elapsed since the grant of administration, *held*, it was his duty to retain as guardian, and the law will presume he did so. 6 Yerger, 220; 6 Dana, 5; *ib.* 60.†

A widow, guardian of her husband's children, and holding all his slaves as widow or as guardian, she and her securities on her guardian bond, are liable for all except her life estate in one-third. But she and her sureties may have been exonerated by the delivery of all, except her third, to the subsequent guardian. And as the latter was bound to obtain possession of his wards' slaves, he and his sureties may be liable with the first guardian and her

*The appointment of a guardian in No. Carolina, being a matter of discretion, cannot be revised by the supreme court. 4 Dev. 294. (See *ante*. p. 37.)

But the *removal* of a guardian, if on improper or insufficient grounds, or if the court had not jurisdiction, is a subject of appeal. 3 Dana's R. 600.

† Where A. administered on an estate, and became guardian of several minor heirs of the estate, executing separate guardian bonds, and the heirs filed a bill against him in equity as administrator and guardian—*Held*: A.'s liability as guardian, was separate and independent, and he could not be sued in both capacities in the same action. 1 How. 365.

sureties, or alone, and are necessary parties to a bill by the distributees claiming the slaves or their value. 6 Dana, 83.

BOND.

§ 33. A guardian's bond executed by an acting justice of the peace, to "A. B. and the rest of the justices, &c." is nugatory. 2 Dev. 6. And a bond payable to the "Justices of the Caswell county court, &c." is void at common law, because they are not a corporation. *Ibid.* (See sec. 5, p. 468.)

In Virginia, a guardian's bond must be executed in open court, and not in the clerk's office. 2 Munf. 492. It is a judicial act, and only the judge can determine the sufficiency of the sureties on the bond. *Ibid.*

The bond of a father appointed guardian of his own children by a county court, when they had no authority to make such an appointment, is invalid as a statutory bond. Yet it may be enforced in equity, and for all the purposes for which it was intended, though the commonwealth is the obligee, and the wards no parties to the bond. 5 Dana, 224.

As to the bonds required of guardians in Mississippi, in different cases, see *ante.* sec. 5, p. 468; sec. 14, p. 471; sec. 18 and 19, p. 473; sec. 20, p. 474; sec. 22, pp. 475-76; sec. 23, p. 477.

A guardian's bond, in Virginia, need not state in the condition, the appointment of the guardian.* 1 Call, 333.

As soon as a guardian appointed by the county court has given the required bond, the appointment is consummated, and cannot be revoked without notice to the guardian. 3 Dana, 600; 8 Pick. 528. And till a second guardian gives a bond, the authority of the first is not revoked. *Ibid.* (See sec. 5, p. 468.)

A guardian applying for an order to sell the real estate of his wards, is required by the statute of 1813, (in Kentucky,) to give bond for the faithful performance of the trust before the decree is rendered; and also to report his proceedings under the decree, to

*Where the guardian intended to remove from the state with her wards, the court required her before entering on her appointment, to give bond for the return of one of them at a suitable age to receive her education in this state; and of both, when required by the court. 2 Hill's Ch. R. 71. As to removal of ward's property by guardian, see sects. 21, 22, pp. 475-76.

the court. 1 Dana, 382. (See *ante*. sec. 17, p. 295, and sec. 23, p. 477.)

An ordinary bond of a guardian renders him and his sureties liable to the wards, for every obligation resulting from acts, which he was legally authorised to perform; and if, when the bond was executed, he was authorised to sell their lands, it secures the proceeds to them. 1 Dana, 368. (But see 4 Dana, 630, by which it appears this results from the statute of 1813, in Kentucky, respecting sale of lands.)

A bond given by a guardian on settlement with his ward, after she comes of age, is no discharge of the guardian's bond previously given, nor can it be given in evidence under the plea of conditions performed, in bar of the specialty. It is merely *prima facie* evidence of what is due.* 6 Rand. 574.

ACTION ON BOND.

§ 34. In New-York, no action can be maintained on a guardian's bond, until the guardian has been called to account in the court of chancery. 19 John. 304. See also 1 Greenl. 186; 3 M'Cord, 237; 2 N. Hamp. 395; 1 Watts, 229; 3 Yerg. 461.

In Connecticut, a guardian is not liable to an action, on his bond, by his ward, until he has been called on by the probate court to account, and has refused.† 1 Root, 51.

An action cannot be sustained on a guardian's bond, executed before the passage of the Kentucky statute of 1813, authorising sale of infant's land, for the proceeds of a sale made under that act. 4 Litt. 1.

A. having intermarried with B. who was the administratrix of C., the personal estate of C. came into his hands and possession;

*The sureties in a guardian's bond are not released from their responsibility to the ward, where on their application to the court for counter security a new bond is executed with other sureties, although the court ordered that such sureties should be released. 6 Har. & John. 98. In Kentucky, if a guardian on entering into bond to indemnify the first sureties, execute a second bond with surety, the county court can accept the latter and exonerate the former. 5 J. J. Marshall, 617. (See *ante*. p. 474, and sec. 9, p. 248, for rule in Mississippi)—and see sec. 12, p. 470.

†Until the relation of guardian and ward is determined, no action lies in favor of the guardian against the ward for advances to the latter. 7 Ham. (part 2d,) 104.

and upon a settlement of their administration account, a distributive share of the balance against them was due to D., to whom A. was appointed guardian. In an action on A.'s bond as guardian, it was held that B. and her sureties on the estate of C., were released from all responsibility on account of it, and A. and his sureties became responsible on his guardian's bond. 6 Har. & John. 162.

A suit may be maintained on a guardian's bond for not delivering up the property of the ward, though no order has been made by the court to that effect. 5 Gill. & John. 27.

An action lies upon a guardian's bond against the surety, without any previous suit against the principal. 1 Call, 333; 5 Gill. & John. 27.

Where the legal effect of a guardian's bond is several, a separate suit may be maintained for the benefit of each ward. 5 J.J. Marshall, 286.

In an action, (in Maryland) in the name of the state against the obligee in a guardian's bond, the non-age of the ward who was over 16 years of age, was held no defence, and not the fit subject for a plea. 3 Gill. & John. 103.

In an action of debt on a guardian's bond dated in 1797, plaintiff proved by a witness that land of the plaintiff, during his minority, was rented by the guardian to witness in 1791, and that the rent was afterwards lessened in consequence of an agreement between them, that the witness should take charge of the stock on the defendant's land—*Held*, such evidence was inadmissible. 2 Harr. & J. 244.

In an action upon the bond of a guardian appointed by the court, brought for the use of the ward, the mere fact that a natural guardian was in existence, at the time of the guardian's appointment, does not invalidate the appointment, so as to render the bond a nullity. 3 Gill. & John. 103.

And where the condition of the bond recited that A. is guardian, &c., and he has obtained possession of the goods, neither the principal obligee nor the surety, in an action upon such bond, can deny that he was guardian in the face of such recital, nor set up as a defence, any supposed irregularity in obtaining his appointment. *Ibid.*

In debt on a guardian's bond, it is sufficient if the breaches are assigned in the replication, and it is not error that the declaration is on the penalty merely. 2 Stew. 370.

An action on a guardian's bond must be brought in the name of the judge of the county court, in Alabama, for the use of the person injured; and the origin of such person's interest need not be alleged. *Ibid.* See sect. 5, p. 468, and sect. 8, pp. 242, 243.

REVOCATION OF GUARDIANSHIP.

§ 35. A mere stranger cannot move in the court of probates for the revocation of letters of guardianship. 1 How. 73, 295.

A guardian is entitled to notice of an intended motion to remove him.* 3 Dana, 599; 7 Yerg. 143.

And the record must recite the proceedings. *Ibid.* (See *ante.* sect. 7, p. 8.)

A guardian cannot maintain a bill to recover the estate of his wards, after they are of age. 3 Dana, 439; 4 Call. 250.

So, on the marriage of a female ward under age, the authority of the guardian ceases. 10 Yerg. 161—(See *ante.* sec. 13, p. 471; 2 How. R. 893, for law of Mississippi.)

A guardian, appointed by the court, without limitation of time, while the minor is not of sufficient age lawfully to choose for himself, will hold until he arrives at full age, unless the guardian be removed from office, or another be chosen to the acceptance of the court. Kirby, 286.

A county court (in Tennessee,) may displace a guardian when they deem it necessary to the interest of the ward. 3 Yerg. 336. And the order of the court need not recite the cause for which he was removed. 7 Yerg. 145. See *ante.* sect. 7, p. 469, and see sect. 3, p. 467.

Where it appeared that a guardian failed to return his account, employed the slaves, &c. of his ward in his own service, kept his own stock on his ward's land and fed them on his ward's corn—*held*, this was sufficient cause of removal. 1 Stew. 166.

*An order for the removal of a guardian is the subject of an appeal. 3 Dana, 600.

GUARDIAN, *AD LITEM*.

§ 36. The duty of watching over the interests of infants devolves in a considerable degree on the courts. The court may appoint as guardian to defend the suit, one who, though usually the nearest of kin not interested in the subject, may be, while the parents live, a person not appearing from his name, or shown on the record, to be connected with them. 8 Peters, 128. But a guardian *ad litem*, must be a real and not a fictitious person. 2 Cowen, 430.

A guardian *ad litem*, appointed to prosecute an appeal on behalf of an infant, is not obliged to accept the appointment;—and a reasonable time will be allowed him to consider whether he will accept it, and to prepare for trial. 2 Munf. 342.

A general guardian cannot act for infants on a petition for partition. 1 John. 509.

A guardian *ad litem*, is not competent to bind his ward, by a release, to qualify a witness. 4 Verm. 523.

POWERS OF GUARDIAN.

§ 37. Generally those acts of the guardian are binding on the infant, which are for the infant's benefit, and for which the guardian can account. He may therefore in a suit brought for the benefit of his wards, execute a release in order to render a witness competent. 1 Hill's Ch. R. 409.

They may lawfully submit to arbitrators questions and controversies respecting the property and interests of his wards. 2 Fairfax, 326; 12 Connt. 376. But an award on such submission by the guardian, is (in Massachusetts,) voidable by the infant on his coming of age. 1 Pick. 21.

For the powers of a guardian over the estate real and personal of his wards, in Mississippi, see *ante*. sec. 1, p. 466; sec. 6, p. 468; sec. 8 & 9, p. 469; sec. 10, p. 470; sec. 14, p. 471; sec. 15, p. 472; sec. 18, p. 473; sec. 22, p. 475; sec. 23, p. 477; sec. 24, p. 478; sec. 25, 26, p. 479.

A guardian may purchase for his ward who is one of the heirs of the estate, such portion of the estate as the other heirs refused to take in a partition, and the orphans' court has ordered to be sold. 3 Watts, 369.

LEASE OF LAND.

§ 38. A lease, made by the guardian for nurture or by nature, of the infant's land, whether made in the name of the guardian, or of the infant, is void. 9 Yerg. 463; 10 ib. 10. Such guardian can only take charge of the person, and education of the infant, and has no authority over his real estate. *Ibid.* 1 N. & M. 369. But as estoppel must be mutually binding, such lease would therefore not estop the lessees from disavowing the lease, or from setting up a title in themselves, or from holding of a third person.

It is the duty of a guardian of the property of an infant, to rent his ward's land. When it has been rented, he will be charged with the amount he received; and when not rented out, he must, in cases where it could have been rented, be charged with its estimated value. 10 Yerger, 161.

A guardian in socage may *lease*, avow, and bring trespass, in his own name. 5 John. 66. He is entitled to the custody of the land, and to the profits, for the benefit of the heirs. *Ib.* They may lease land to try titles. 4 Gill & John. 323.

In Virginia, a guardian may lease the lands of his ward during infancy, (if the guardianship so long continue,) and may reserve the rents to the ward or to himself. And payment of the rent in either case, to the guardian would be good. 1 Wash. 87. A lease for a longer term than infancy, is void. 4 Call, 250.

In Mississippi, guardians whether testamentary or appointed by the court, are entitled to the custody of the estate *real* and personal of their wards. (Sec. 1, p. 466, and sec. 6, p. 468.) And he may cultivate the same, or lease the same for a term, not exceeding *three* years, and within the *non-age* of the ward. Sec. 8, p. 469.

In Virginia, a guardian has possession of the ward's lands, during guardianship; and therefore he may maintain trespass for entering the ward's land and cutting or carrying away trees without license; and he is accountable to his ward for the damages recovered. 6 Rand. 566. But, if done with guardian's permission, the wrong must be compensated by the guardian to the ward. *Ib.* See *ante.* sec. 8, p. 469, and sec. 15, p. 472.

§ 39. A guardian may, and is bound to maintain and educate his wards, to the extent of the income of their estate. See *ante*. sec. 9, p. 469, for rule in Mississippi.

Where the sum of money allowed by the orphans' court to a guardian, for the maintenance and education of his ward, exceeded the annual income of his ward's estate—*Held*: in an action against the guardian by his ward, the guardian was concluded thereby, and the jury could not exceed the sum so allowed to him. 3 Harr. & John. 251.*

Where the husband dies leaving a widow and infant children, and she enters on the land of which her husband was possessed, it will be intended that she was in possession by right, and that she entered as *guardian in socage*, where the entry, and perception of profits, are unaccompanied with acts or declarations inconsistent with that character. 7 John. 157.

It is proper, in some cases, for the father, who is guardian of his own children, to be allowed to use their own means for their support and education. 3 B. Monroe's R. 161.

A chancellor would require a strong case to be made out to induce his interference to restrain a guardian in expenditures for the education, &c. of his ward, within the income of the estate, and sanctioned by the friends and near relations of the ward. 4 B. Monroe, 321.

And a case still stronger, to render the sureties of the guardian personally liable after such expenditure had been made, with the sanction of the mother and friends. *Ibid*.

But a guardian is not authorised to break in upon the capital of his ward for his maintenance, except under peculiar circumstances. And if the guardian advances beyond the income, as a general rule, he will not be allowed interest on a balance due for maintenance. 2 McCord's Ch. R. 58.

*Where a father died intestate, leaving a large real and personal estate, and his infant children were maintained by their mother—*Held*: the mother was not bound to maintain the children out of her third of the estate, but was entitled to be allowed out of the portion of the infants' for their maintenance, during their infancy, as well for the time past as to come. That she was to be charged with interest on two-thirds of the money received by her, while managing the estate, and be allowed interest on all sums expended by her. 6 John. 566.

When the income is insufficient, he must obtain an order of court, authorising sale of a portion of the ward's property. See *ante*. sec. 9, p. 469.

A properly constituted guardian is entitled to receive money due to an infant. 1 Bailey, 203. Payment to the ward's father (illegally appointed,) will not exonerate the executor, unless the ward adopts the act. The executor should have a receiver appointed by a court of equity, or retain the fund till such appointment is made, and the executors will remain liable, although the wards may attempt to enforce a lien on land, in which their money has been invested, and is a proper party to a suit for that object. 5 Dana, 224.

Where a promissory note payable to a person *non compos mentis*, was paid by the promissor to the person *non compos*, with knowledge of the existing guardianship, such payment was held to be of no effect, and the letter of guardianship to be conclusive evidence of the ward's unsound mind. 14 Pick. 280.*

Payment of a judgment or decree to the guardian by nature, is no discharge. 10 Yerger, 10. Such guardian has care only of the person of the ward. *Ibid*. 3 Pick. 213; 4 Gill. & John. 323.

Where the commissioner under an order of the court to deliver to the guardian the portion of the wards, whether in money or in bonds, delivered up the guardian's bond, given for purchases, on sales for partition—this is no discharge of a bond, nor a satisfaction of the mortgage to secure it. And the defendant, with a knowledge of the facts, taking a mortgage from the guardian of the property purchased, takes subject to the equity of the wards. 1 Hill's Ch. R. 574.†

*Whether a payment of a judgment to a *guardian ad litem* is valid, query? 10 Yerger, 10.

† In So. Carolina, a court of chancery may order funds to be paid to a foreign guardian, on ascertaining the guardian's appointment, fitness, and the sufficiency of his sureties. 1 Hill's Ch. R. 141.

In Maryland, a guardian appointed in another state, cannot, by virtue of such appointment, exclusively act as guardian in the *former* state in respect to property lying there, and under the control of their orphans' court. 4 Gill. & John. 332. (For rule in Mississippi, see 2 Sm. & M. 532, and *ante*. sec. 18, p. 473.)

The purchaser of an infant's estate from the guardian, pays the money either to the guardian or the ward, at the risk of the ward's disaffirmance of the contract. 4 Dana, 633.*

If the guardians of a minor, in a deed of conveyance covenant in their capacity as guardians, that the father of the minor died seized of the premises, and that they as guardians, in right of the minor heirs were lawfully seized of the premises—*Held*: the guardians were personally liable on these covenants. 15 Pick. 428.

PROFITS.

An executor is not allowed to trade upon or make profit for himself out of the estate in his custody, nor out of the rights of those interested in it. A contract by which the executor buys the ward's interest in the estate of his guardian, will not be sustained or respected, but the sum paid for the purchase will be deemed a payment on account of the ward's claim, for which the executor will be entitled to a credit, with interest on it, if paid before it was due. 5 Dana, 570.

And if a guardian purchase land with the money of his wards, they may elect to take land absolutely at what it cost, or they may consider it as a security for the money. *Ib.* 323.†

But a court of equity will sanction such use of a ward's funds by his guardian, as it would have directed, if a previous application had been made; and though the will may have directed the rents to be let out till the youngest child comes of age, and then divided among the children, the court will direct that they shall be applied to his support and education, in the mean time, if they are required for that purpose. 5 Dana's R. 593.

Where a guardian imported into Maryland, contrary to law, a slave belonging to the minor—*Held*: such act did not entitle the

*A guardian, his wards and others being tenants in common, a contract signed by the guardian and wards stipulating to convey "our interest" in the land, imposes no obligation on him or his wards, for their title. 1 Dana, 367.

†A ward cannot by purchasing a paramount title, overreach a lien given by his guardian, on real estate claimed by and in possession of the ward, as inherited from the ancestor. 2 Ohio R. 408.

slave to his freedom, though the minor assented to such act during his minority. 3 Harr. & John. 557.

CONTRACT BY GUARDIAN.

A guardian cannot by his contract bind the person or estate of his ward—6 Mass. 58; 1 Pick. 314—Nor avoid a beneficial contract made by his infant ward.—13 Mass. 237. He is a mere agent of the ward, having a naked power without an interest. 7 Mass. 1; 13 Pick. 306. He can do no act to the injury of his ward. 10 John. 438.

In South-Carolina, a guardian is not liable except on express contract for medical attention to his ward. 1 Bailey, 344.

Where the guardian is morally, though perhaps not legally bound to make good a loss which his ward has suffered, a promissory note executed by him to his ward, for the amount of the loss, is a sufficient consideration, and is binding on him. 9 Yerg. 418.

A guardian agrees to pay the ward's mother a certain sum for their support, as he is personally liable for it, it is no defence that he has exhausted their estate in paying their debts. 5 Dana, 107.

A guardian is not liable on a contract made by his ward, for board and tuition of the latter, although he knew his ward had made the contract, and he did not give notice of his dissent from it—1 Hill's R. (S.C.) 279; 1 Bailey, 344—even though it be for necessities. *Ibid.*

And a promise by a guardian to pay a debt contracted by his ward, is an original and not a collateral undertaking within the statute of frauds, and need not be in writing. 1 Bailey's R. 419.

A deed by a guardian, of her infant's or ward's interest in real estate, does not convey the guardian's right of dower. 10 S. & R. 326.

If a guardian consent to the misapplication of the ward's money, by his co-guardian, he is liable. 11 S. & R. 66.*

*Where an infant residing with his mother, in one probate district, inherited from her father real estate lying in another district, the probate court of which appointed a guardian to her; and the person thus appointed took possession of her estate and supported her till a certain period, when he refused to support her, but

CONTRACT BY INFANT.

An infant, who has a guardian or parent, *who supplies his wants*, cannot bind himself for necessities. 4 Watts, 80; 9 John. 141; 3 M'Cord, 6.* It might be better said that if the guardian or father *supplies his wants*, articles sold to the ward, cannot be *necessaries*; but there can be no doubt, that a ward not under the care of his parent or guardian, who is not thus supplied, may render himself liable for necessities furnished to him, nor is an express promise necessary. 4 Wend. 403; 2 Penn'a. 333; 16 Mass. 28.†

If a parent contract for the services of his child, during his minority, in consideration of a remuneration to be bestowed on the latter, the contract is valid, and will enure to the benefit of the child, who may maintain an action for it in his own name. 2 Bailey's R. 497. Where an infant works for himself apart from his father, his promissory note is not thereby rendered obligatory. 1 Bibb. 330; 2 Penn. 866. The note of an infant, *as such*, has no obligatory effect—1 Bibb. 519—even though given for necessities—10 John. 33†—and though he fraudulently represent himself to be of age. 1 John. Cas. 127; 1 Root, 273.

Where an infant executed a release of her right in land, in collusion with her guardian, having first chosen the guardian for such purpose, and persuaded the releasee to pay her money—*Held*: this was not such a fraud as would bind the infant by her release. 12 S. & R. 399.

offered at the same time to take her into his custody and provide for her himself. In an action against him for necessities subsequently furnished by the mother's second husband—*Held*: he was not liable; for if he was not lawful guardian, one could be appointed who could take the estate out of his hands;—if he was lawful guardian, he could not be subjected, in an action at law, as for his proper debt. 2 Conn. 386.

*The mother of an infant, whose father is dead, is not bound to support such child, if its own estate be sufficient. 4 Mass. 97; 2 ib. 15—Otherwise in case of a father. 4 Mass. 97.

†A horse is not necessary to an infant, and he is not therefore liable on a note given for a horse. 2 N. & M. 524. But the sale is a valid transfer of the title to him. 1 Bailey, 320.

†See 2 Hill's (S. C.) R. 400, *contra*. And if the surety to an infant's note given for necessities, pay it, he may recover the amount from the infant. *Ibid*.

But if an infant sell goods and receive the money for them, he shall not be permitted to recover back the goods, without refunding the money. 15 Mass. 359, 363.*

No laches or neglect is imputable to an infant. 1 Bay. 64.—An infant is liable for torts—3 M'Cord, 257—for trespass and assault—3 Wend. 391—and in trover, though the goods were delivered to him on his own contract, and not converted to his own use. 6 Cranch. 226.

Whenever a statute has authorised a contract for the public service, which is to be performed by minors, such contract will be deemed for their interest: as, an act enlisting minors in the navy, or army. 1 Mason's C. C. R. 78; Brayt. 119; 11 S. & R. 93; 10 John. 453.

An infant's contracts which may be beneficial to him, are only voidable, and not void. 13 Mass. 237; 14 ib. 457. And there is no difference in this respect between an executed and an executory contract. 5 Sm. & M. 215. See 10 Peters, 59; 8 ib. 128; 4 Verm. 149.

But though the *executory* contracts of an infant are voidable, he cannot avoid such contract, when partially executed, and recover compensation for work performed *under it*, as if no special agreement had existed. 8 Cowen, 84.

An infant may avoid a claim on him, as endorser of a note, for default of payment by the promisor. 15 Mass. 272. Whether to the prejudice of a *bona fide* holder, see 13 Mass. 204; 15 ib. 272.

An assignment, by an infant, of a promissory note not negotiable, may be avoided by him, by giving notice to the assignor that he considers the bargain void, and offering to return the consideration received. 13 Mass. 204.

An infant's contract, as surety on the promissory note of another, being against his interest, is void. 4 Connt. 376.

*An infant may for valuable consideration endorse a bill of exchange or promissory note, so as to transfer the property to an indorsee. 15 Mass. 272—see 13 Mass. 204. If permitted to ride his father's horse, he may bind him by a contract necessary for the existence or preservation of the horse. 1 Overt. 19. To incapacitate an infant because under the care of a parent or guardian, he must be under actual and legal government, as to the subject matter of the contract. 6 Connt. 494.

An infant may avoid any contract to sell or release their rights, for which they are entitled to an equivalent. 6 Mass. 78.

Sales made by adults to infants, having the semblance of benefit to the vendee, are voidable by the infant, but not by the vendor. 13 Mass. 237.

An infant who has disposed of his personal property, and done no act after coming of age to confirm the sale, and has pursued his remedy in good time, is entitled to receive it back. 5 Sm. & M. 215. And this, as against a sub-vendee, though for valuable consideration, with notice. *Ib.* The doctrine of notice is applicable to purchasers of real estate only. *Ib.*

A second deed by an infant does not avoid the first—6 John. 257—otherwise, if he made the second after coming of age. 2 Dev. & Batt. 320; 11 John. 539; 14 ib. 124.

A conveyance of land by an infant is voidable, or void, at his election. 4 N. Hamp. 441.

If for a valuable consideration, it is only voidable. 13 Mass. 371; 15 ib. 220.*

If an infant mortgage land during his infancy, and after coming of age, convey the land, subject to said mortgage, the mortgage is thereby confirmed. 15 Mass. 220. Or, if he buy land subject to a mortgage while an infant, and after coming of age retains the land—*held*, this is a confirmation of the mortgage. 6 Greenl. 89. Both the deed and mortgage, or neither will take effect. *Ibid.* 1 N. Hamp. 73.

So, if an infant agree to have a judgment rendered in his favor, with a condition, he cannot have the benefit of the judgment by affirming it after he comes of age, without the condition also. 1 Dana, 46.

Contracts respecting the lands of infants, entered into between the mother as guardian of the infants and a third party, though absolutely void at law, will yet be sustained in equity, to the extent, and to that extent only, of the equity they give for a liberal remuneration for services performed. 2 Brock. C. C. R. 43.

A mere recognition, by an infant, after coming of age, of the

*A manumission of a slave by an infant, though done with the approbation of the guardian, is voidable. 10 John. 132. See *ante*. page 491-2.

fact, that a conveyance has been made, does not confirm it, *per se*. 10 Peters, 59; 8 ib. 128; 9 Mass. 62, 64; 10 ib. 138, 140; 14 ib. 487, 460; 1 Pick. 202, 221, 223; 4 ib. 48.*

But however solemn the instrument, it is held to be void, if prejudicial to the infant, *on its face*. *Ibid.* If only voidable, it remains good, till avoided. 3 A. K. Marsh. 7.

An infant may avoid his act, by different means, according to the circumstances of each case. *Ibid.* A slight circumstance, after arriving at age, will make such contract binding. 4 M'Cord, 241. See Connt. R. 468; 1 Bailey, 28; 2 ib. 114; 1 Pick. 202; 14 Mass. 457; 3 N. Hamp. 314; 8 Greenl. 405; 1 Hayw. 143.

The retention of the consideration for which a note was given, after his coming of age, is not a ratification of the note. 9 Conn. 330. Nor is a submission to arbitrators respecting his liability. *Ibid.* But where an infant took the note of a third person in payment for work done, and retained it for eight months after coming of age, and, the maker of the note having become insolvent, demanded payment of his work—*Held*: in an action for work by him performed, the retention of the note was a ratification of the contract during infancy, and he could not recover. 11 Wend. 85.

Generally, an infant's having received an order in payment, does not prevent him from avoiding the contract on coming of age, and recovering on a *quantum meruit*. 4 Verm. 149. The privilege of avoiding his own acts, is personal to the infant, and no one else can exercise it. 1 Mason's C. R. 78.

§ 40. The cases in which, in Mississippi, a ward's or infant's lands may be sold by a guardian, under an order of the court of probates, are—

1st. Where the court allows the guardian to exceed the income of the estate, and the personal estate, and the rents and profits of the real estate are not sufficient for the maintenance and education of the ward. Sec. 9, p. 469—sec. 10, p. 470.

*It must be an express promise to pay, or express agreement to ratify—*Ibid.*—and made with the knowledge that the party is not liable at law—9 Mass. 62, 64—and voluntary, not under fear of arrest—1 Pick. 202—and before the commencement of the action. *Ibid.* It will then be valid from its date. 14 Mass. 457, 464. He must also have arrived at full age. 12 Conn. 550; 11 S. & R. 305; 6 N. Hamp. 432. It must be to the party in interest, or his agent. 3 Wend. 479.

2d. For the payment of the debts of a lunatic, contracted when he was of sound mind, where the personal estate is insufficient. Sec. 15, p. 472.

3d. When the guardian suggests that it will be for the interest of the heirs, to sell their land. Sec. 23, p. 476.

4th. When the court shall be of opinion that the interest of the minors will be promoted by a sale of the lands in preference of the slaves and other personal property. Sec. 25, p. 479.

5th. Where any of the foregoing reasons justify the sale of lands belonging to idiots, lunatics, and persons *non compos mentis*. Sec. 26, p. 479.

As the rules regulating sales of land by executors and administrators, are for the most part applicable, the reader is here referred to that portion of this work which treats of the former—p. 285–302.*

Before granting authority to a guardian to sell the lands of a minor, the court ordered notice to the presumptive heirs of the ward. 3 Mass. 398. But notice is not required by law to be given, upon applications for the sale of minors' estates. *Ibid.* 326. See *ante.* sec. 9, p. 469; sec. 10, p. 470, and sec. 15, p. 472.

A license for the sale of a minor's real estate must be granted in the alternative for public or private sale. 5 Greenl. 240; *ante.* sec. 10, p. 470.

The decree of an orphans' court, ordering the sale of an intestate's real estate, is not void as against a minor, because he did not appear by guardian. Notice to the minor is sufficient. But if such decree is erroneous, the minor is not concluded by his own or his guardian's acceptance, if he renounces soon after coming of age. 5 Binn. 1.

Where upon the petition of the guardian of the minor for license to sell real estate of the ward, such license is granted, and a person appointed to make the sale, the agent is bound to answer upon oath, in the probate court, interrogatories relative to his proceedings under the license. 11 Pick. 113. Where such

*Upon the petition of the guardian of a minor for license to sell enough of his ward's land to pay his debts, the certificate of the judge of the probate court is not necessary, and is required only where the application is made for authority to sell a greater quantity. 3 Mass. 397.

agent sold the land and took mortgages for the purchase money in the name of the minor, and, after the minor came of age, received from her a power of attorney, to discharge the mortgage, it was *held*, that he was not thereby discharged of his obligation to render an account, and answer such interrogatories in the probate court. *Ibid.*

SALE OF PROPERTY.

Under the act authorising the sale of a ward's property for payment of his debts, the court must first ascertain that there are debts due by the ward, which render the sale of the property expedient; and must select the part or parts of his property which can be disposed of with least injury to the ward. 1 Iredell's R. 259.

Therefore an order, to sell as much of the ward's land as will satisfy his debts, is unauthorised and void, and a purchaser at a sale, under such order, acquires no title. *Ibid.*

The statutory guardian, who has received the money for real estate sold, is responsible to the ward or his intestate or his assignee, on his bond. 3 B. Monroe, 293.* Ante. p. 240.

If the tenor of the guardian's bond is such as to hold him responsible for the proceeds of the real estate of his wards, which he was authorised to sell, the manner of the sale is immaterial;—if it be even verbal, and he receives the money, and the wards are willing to confirm the sale, he and his sureties will be answerable on their bond. 1 Dana, 367. In such case it is the duty of the court (having jurisdiction) to order the guardian to pay proceeds and interest by a given day, and on failure thereof to render a joint decree against him or them and his sureties in the bond, for the amount. 1 Dana, 382.†

*The sureties of a general guardian are not bound for funds paid to him which have been created by sales of real estate, under an order of court, for the purpose of partition among minor heirs. A special bond should be required embracing the specific fund. 3 Humph. 592.

Where guardian and wards resided in another state, and land lying in Tennessee was sold for the purpose of division, the court would order the proceeds to be paid to such guardian, on his giving a special bond to account therefor to the distributees. *Ibid.*

†If the guardian buys the ward's land of him, or sells it to another, the ward's only security, (in addition to the personal responsibility of the guardian when he has received the price,) is in his right to disaffirm the contract after he comes of age, and hold the land. 4 Dana, 631. Query—Could the sureties be held liable for the rents and profits? *Ibid.*

In a deed by a guardian of his ward's land under an order of court, the reason for granting the license and making the sale, need not be stated. 10 Pick. 376.

A guardian sold his ward's property at auction, being himself the auctioneer and employing an agent to bid on his account; and the question arising, whether the agent or another person made the last bid, the other person bidding higher, the guardian decided in favor of the agent. The purchaser was to take the land by estimation or measurement, as he should elect at the time of the sale—but he made no election. He afterwards sold the land at an advanced price. The quantity, on admeasurement, turned out to be less than the estimate. *Held*: the guardian must account at the advance for which he sold; that he was bound by the estimation; and that even if there was another sale, the guardian shall not charge himself, with the amount of that sale as the value of the land, for the trustee shall not buy so as to make profit to himself. 13 Pick. 272.

Lands of minors sold remain bound for the purchase money. How. & H. 417.

WASTE.

A guardian is not liable who takes a bond without security, provided he acts with common skill, common prudence, and common caution. 1 Penn. R. 207.

If a guardian consent to the misapplication of the ward's money by his co-guardian, he is liable. 11 S. & R. 66.

Where a guardian under a will was not entitled to receive principal or interest of his ward's money, he is not liable on account of the insolvency of the executor. 12 S. & R. 317.

A guardian who invested funds of his wards in bank stock, in good faith for their benefit, and received the dividend in depreciated paper, was held accountable for their money with interest to his loss. Under the circumstances, the interest shall not be compounded. 2 Dana, 252.

Land of a decedent was sold by order of court, the proceeds to be applied to the payment of a debt, and distribution among the widow and heirs. The sale was on credit for *par* money, but a depreciated currency was received by the defendant, who was administrator and guardian. Though the currency was received

by him in good faith, as he had no authority to receive it, he is accountable for the full amount as so much money. But some of the heirs having received the *same* of him after they came of age, voluntarily, are presumed to have received it understandingly, and having acquiesced in that settlement for several years, it shall not be disturbed. Their former guardian is entitled to credit for sums paid them, without reduction for the depreciation. Those who have not received their shares, are entitled to the full amount in lawful money, which their guardian might have coerced. 6 Dana, 204.

Proof that slaves hired out by a guardian were worth more, in the opinion of the witnesses, than the prices at which they were hired by the guardian, does not prove that the guardian acted improperly, or that there was either *fraud* or mistake in a settlement made with him by the court. 4 B. Monroe, 325.

Where a guardian neglected for nine years to collect the hire of a slave owned by his ward, and no suit was brought by his ward after he arrived at full age, until the claim was barred by act of limitation—*held*: the guardian was liable for the amount, notwithstanding it might have been collected by the ward, had he brought suit within the period of limitation. 9 Yerger's R. 418.

HABEAS CORPUS.

§ 41. The father, upon principles of common law, is entitled to the exclusive custody of his children;—and if he have the custody of them, a court of common law will not deprive him of it, except for an abuse of trust, either by improper violence or improper restraint, and such as would justify the issuance of a writ of habeas corpus for their protection. 4 Humph. R. 523.

A court of common law is not bound in a proceeding by *habeas corpus* to deliver the child to the father, where he has not the possession of it, but may act according to the circumstances of the case. The great leading object should be the interest and welfare of the child; and therefore, where the child is of sufficient age to judge for itself, the court should leave it to go where it pleases. *Ibid*.

The wife has no right by common law to the custody of the children as against the husband, and she cannot be looked to by

the court, except so far as she may be considered in reference to the tender age of the children, and other considerations, as the most suitable person to have control of them for their benefit. *Ibid.*

A writ of habeas corpus may properly be issued by the husband against a wife, to obtain the custody of their child. 16 Pick. 203. Where in the case of an unauthorised separation of a wife and child from her husband, without any apparent justifiable cause, it was not clearly proved that the husband was unfit to have the custody of the child, the court ordered it to be restored to him. *Ibid.*

A *habeas corpus* will not be granted, on application of a father, to take a child of three years old from the mother, where the mother lives with the father, and the child is well taken care of, and not likely to be so by the father. 2 Root, 461.

On habeas corpus for a child, a court would not decide between the claims of the mother and the guardian, and permitted the child to go with whom he chose, without molestation from either. 10 Pick. 274; 6 Mass. 273.

Habeas corpus will not lie to enable a guardian appointed according to law to obtain the custody of his minor ward, who remains voluntarily with his mother. 2 South. 445.

§ 42. Upon a *habeas corpus*, to restore an infant to the custody of the parent, the court will look into all the facts stated in the return; and will not discharge the defendant, simply because he declares the infant not to be in his possession, power or custody, if the conscience of the court is not satisfied that all the material facts are disclosed. 3 Mason's C. C. R. 482.

And, on a writ of *habeas corpus* by a guardian to regain possession of his ward, who has been forcibly taken from him by the parent, the court cannot entertain jurisdiction, unless the ward is restrained of his liberty. 6 How. 406. For, where it appeared, that the ward was forcibly taken from the possession of the testamentary guardian by the mother, and it appeared the ward's interest and inclinations would be consulted by remaining with the mother, the court, on a writ of habeas corpus, refused to restore the ward, although it did not appear that the guardian had, in any way, abused his trust, or was incompetent to discharge it. *Ib.*

ACCOUNT.

Guardians must settle their accounts annually, adding each year the interest on the funds in their hands to the principal. But the act does not apply to testamentary guardians, as they are not within the jurisdiction of the courts. They are accountable in courts of equity as other trustees are, and in like manner liable for what interest they make on the funds entrusted to them, or which they be presumed to have made by faithful and prudent management. 5 Dana, 594.*

As to proceeds of land sold in another state, see 3 Dana's R. 223. The account should be with each distributee separately. *Ibid.* See 8 S. & R. 12. He is chargeable with interest if he fails to invest the funds of his ward. *Ibid.*—and 4 S. & R. 112.

But if a guardian cannot let the money or collect the interest, he will be excused and held accountable for interest, so far only as he received it. If he uses the money himself, he will be held accountable for compound interest. 2 Dana's R. 251. Whatever a guardian has received belonging to his ward, he must account for. 1 Humph. R. 210; 6 Rawle, 323.

A guardian is not chargeable with interest for money in his hands, unless he has consented to take the money at interest, or unless it has been loaned out at interest under the direction of the court. 5 How. 422.

A guardian, on the arrival of his ward at full age, must exhibit a final account, and deliver up all the property of his ward; and from that time money in his hands will bear interest. 3 Gill. & John. 103. If guardian dies, infant may compel a settlement, as if of age. 21 Black. 141.

A guardian should be allowed for clothing for the ward, (there being no suggestion that they were not clothed,) though there is no regular account of it; and for their board also, when it appears that they were kept at school, though they were old enough to earn their bread. 5 Dana, 395.

*Rests should be regulated by the circumstances of each case. In this, where the testamentary guardian cannot be presumed to have made compound interest, but did probably collect interest occasionally, a rest at the end of each three years, to add the interest then in his hands to the principal, is deemed proper. *Ibid.*

Where testamentary guardian was the grand-father of the wards, and had made no charges against them for his personal services, nothing should be allowed in a decree against his executors on that score. The actual expense and compensation for board and clothing only should be allowed. *Ibid.*

A guardian having paid money on account of his ward, must include it in his account, before the court of probate. 7 Pick. 47. He cannot sue the ward. *Ib.* He will be entitled to interest on such advances. 13 Pick. 272.

Transactions between a guardian and his ward, during the minority of the latter, are alone the subjects of settlement in a guardianship account. 2 Watts, 295.

Where a guardian has removed and neglected to settle his account in the probate court, it was held, that the administrator of one of his sureties might settle his account. 1 Pick. 198. The statute of Massachusetts does not require it to be settled on the oath of the guardian. *Ibid.*

Where a guardian gave a negotiable note as guardian, it was held, that he was liable in his individual capacity, after his guardianship was discharged, and might indemnify himself out of the estate of his ward. 5 Mass. 300; 6 ib. 58.

Every item of a guardian's account should be supported by a voucher, or some other satisfactory evidence of its correctness.—If the evidence is not reported, the settlement should be rejected, and the accounts again referred. 5 Dana, 554.*

The son-in-law of a guardian is not a suitable person for a commissioner to settle the guardian's account; but the fact that one of the commissioners is so related to the guardian is not, *per se*, sufficient cause for rejecting the report. Yet it should induce extraordinary vigilance in scrutinizing it. *Ibid.*

*A distributee is not concluded by a receipt, exonerating his guardian, given soon after the ward came of age, and without a full knowledge of the facts. 6 Dana, 204. Nor by a receipt given in order to obtain papers from the guardian. 4 S. & R. 112.



INDEX.

ABSENTEES —non-resident guardian,	22, 473
non-resident parties interested in exr's. & admr's. acc't.	23
saving as to non-residents, in probating wills,	202
next of kin may designate administrator,	236
while absent, grant shall be <i>durante absentia</i> ,	236
how, where in a hostile country,	237
executor residing abroad, how removed,	245
legatees' distributees, heirs or ward, residing abroad,	334
notice to, on sale of real estate,	476
ACCOUNT —of executor and administrator,	326
by whom, exec'r. or adm'r. being dead,	327
voucher and evidence of payment,	327, 328
order of payment,	328, 329
what payments allowed,	329, 330
what not,	331, 332
oath and answers of administrators,	332
final settlement,	333
opening and correcting accounts,	332
proceedings on exception thereto,	333
bill of review,	334
decree, effect of,	334
ACTIONS —by and against executors and administrators,	366, 371
for legacies,	196, 199
exec'rs. and adm'rs. entitled to same as deceased,	223, 225
against executors <i>de son tort</i> ,	229-30
on bond of executors and administrators,	343-5
by administrator <i>ad coll.</i>	249-50
by administrator with will annexed,	253
by administrator <i>de bonis non</i> ,	254-55-56-57
by husband and wife,	280-81
in case of insolvency of estate,	313, 17, 18
against widow for waste,	414
at law, for legacy or distributive share,	431
on guardian bond,	468, 484-85

ACTIONS—*continued.*

not allowed within 9 months after death of intestate or testator,	312
nor after report of insolvency,	312, 313
ADMINISTRATOR—in England,	215, 216
how and when appointed,	233
who entitled to—who preferred,	234, 236, 237
when appointment void,	234, 237
when voidable,	234, 235, 236
when granted notwithstanding will,	235
jurisdiction of, what county,	235
oath of, and bond,	238
<i>ad colligendum</i> , when appointed—form of, oath and bond,	249
power of, duration of,	249, 250
<i>with the will annexed</i> , when,	251, 253
who may be,	251, 252
power and duty of,	252, 253
to account, when,	253, 257
<i>de bonis non</i> , when,	253, 254, 264
who entitled to,	253
when void—when valid,	254
by what court granted,	254
power and duty of,	254, 255
action by,	255, 257
against,	257
in chief, who qualified,	257, 258, 259
provisions in relation to, extended to ex'rs. and adm'rs.	258
inventory by—(See INVENTORY)	259
where no executor or administrator will qualify,	365, 366
actions by and against,	366, 371
party in the singular means plural,	258
rules respecting executors apply to administrators,	258
ADVANCEMENT—what,	427
must pass during parent's life,	427
depends on the intention of the parent,	427
<i>pro tanto</i> ,	428
may be contingent,	428
benefits not advancements,	428
only in case of intestacy,	429
widow derives no benefit from,	429
English rule as to gifts by mother,	429
rule in Mississippi,	429
to be valued as at the time of gift,	429
jurisdiction of, orphans' court,	429
petition for distribution,	429, 430

ADVERTISEMENT. (*See* NOTICE and PUBLICATION.)

AD COLLIGENDUM —letters, when granted,	- - -	249
form of, and oath and bond,	- - -	249
collector may collect goods,	- - -	249
may sell perishable property, how,	- - -	249
commission of,	- - -	249
may sue for debts and release same,	- - -	249
power to cease, when,	- - -	249
must deliver property to administrator,	- - -	249
on failure, may be attached and fined,	- - -	250
cannot sell any, except perishable effects,	- - -	250
cannot distribute the estate,	- - -	250
one collector may compel another to inventory,	- - -	24

ALLOTMENT —of dower,	- - -	383, 391
of distributive shares,	- - -	432, 433
among joint tenants, &c.	- - -	435, 437

ANSWER —to petition,	- - -	21
-----------------------------	-------	----

APPEAL.

Statute regulating appeals,	- - -	27 & 41
difference where pleadings are plenary and summary,	- - -	28
how judgment above to be rendered—note to,	- - -	28, 29
what party may appeal, and wherefore,	- - -	29, 31
when party's interest to appear,	- - -	31
what the record must show,	- - -	31, 32
when appeal to be entered above,	- - -	32
what judgment court above will render,	- - -	28, 29, 40
court above must have jurisdiction, of the record,	- - -	40
if not, no judgment for costs can be given,	- - -	40
when costs allowed,	- - -	40, 41

APPLICATION —for letters testamentary, &c.	- - -	20
---	-------	----

APPRAISEMENT —on granting letters testamentary,	- - -	259
three or more appraisers appointed,	- - -	259
appraisers must not be related to the deceased, nor interested,	- - -	259
on death, refusal or neglect of one, another warrant,	- - -	259
oath of appraisers,	- - -	259
proceedings of appraisers,	- - -	260
how certified and sworn to,	- - -	260
further time, when granted,	- - -	260
executor to return appraisement,	- - -	260
on failure, how compelled,	- - -	260
notice by appraisers to persons interested,	- - -	260
how far evidence,	- - -	261
second appraisement,	- - -	261

(*See* INVENTORY.)

ASSETS —title to vest in executor or administrator,	-	-	265
relates to death of decedent,	-	-	265
extends only to property in the state,	-	-	265
lands go to the heir and not assets,	-	-	265
lands only equitable assets, when	-	-	266
rents accruing before death of intestate, are assets,			266
buildings not assets,	-	-	266
a still is, and mortgage on land, and annual fruits,			266, 267
of emblements, who entitled to,	-	-	267
growing crops, when assets,	-	-	267-68-69
damages assessed in intestate's life-time, are assets,			269
money under treaty, and damages for breach of covenant committed in life time of intestate,	-	-	269
land script is assets,	-	-	269
hire and increase of slaves are assets,	-	-	270
equitable interests are,	-	-	270
debts to decedent, when	-	-	270
money recovered and received by administrator,	-		270
remainder and reversion are assets,	-	-	270
proceeds of lands in other states, not assets here,	-		271
bonds to adm'r. when—debt of adm'r. when,	-		271-273
when adm'r. bound to litigate for,	-	-	273
of fraudulent conveyance of,	-	-	273-74-75
choses of wife, when assets,	-	-	275-280
what are not assets,	-	-	280-283
order of disposition of assets,	-	-	284
how marshalled,	-	-	336, 340
ATTACHMENT —to compel commissioners of insolvency to report,			313
to compel performance of decree,	-	-	24-5
to compel an inventory,	-	-	260
AUDITORS —on final settlement of executor's accounts,	-	-	333
AUTHENTICATION —(<i>See EVIDENCE.</i>)			
BASTARDS —when they may inherit—note to,	-	-	423
guardianship of,	-	-	473
BEQUESTS —(<i>See WILLS, and DEVISES, and LEGACY.</i>)			
BILL , of review—(<i>See ACCOUNT.</i>)			
BOND —of executors and administrators,	-	-	238
how payable,	-	-	238, 242
effect of,	-	-	238, 239
by joint administrators,	-	-	239
obligation of,	-	-	240, 241
breach of, what constitutes,	-	-	241, 242
action on,	-	-	242, 245
conditions how far good,	-	-	244

BOND— <i>continued</i> —when void,	-	-	-	-	244
party first entitled to satisfaction,	-	-	-	-	244, 245
of guardians,	-	-	-	-	466, 468, 473, 474, 476
on sale of lands,	-	-	-	-	477
of clerk of probates,	-	-	-	-	457
CITATION—to heirs, distributees and heirs, on adm'rs. account,	-	-	-	-	333
how served,	-	-	-	-	334
on sale of lands,	-	-	-	-	286, 295
(See SUMMONS.)					
on decree of court,	-	-	-	-	25
on appeal—note to,	-	-	-	-	29
to orphan,	-	-	-	-	467
on petition to remove wards' property,	-	-	-	-	475
CLAIMS—when to be presented,	-	-	-	-	309, 358
within two years,	-	-	-	-	358-9
notice for, required	-	-	-	-	310
what sufficient,	-	-	-	-	310
when limitation commences,	-	-	-	-	310
legal publication, what	-	-	-	-	310
CLERK OF POLICE—who,	-	-	-	-	458
his duties,	-	-	-	-	458, 465
CLERK OF PROBATE—when appointed <i>pro tem.</i>	-	-	-	-	442
allowance for furnishing clerk's office,	-	-	-	-	442
deeds, &c. recorded by,	-	-	-	-	442, 443
transfer of suits, &c. to office of,	-	-	-	-	443
may appoint deputies,	-	-	-	-	444
offices where kept,	-	-	-	-	444
disposition of records, when office vacant,	-	-	-	-	444
razing records, penalty of	-	-	-	-	445
may administer oaths, when	-	-	-	-	445
to keep and preserve records, &c.	-	-	-	-	447
duty of, in Hinds county and Yazoo,	-	-	-	-	447, 448
bond of,	-	-	-	-	457-8
duties, incidental,	-	-	-	-	457
is clerk of board of police,	-	-	-	-	458
duties, as such—(See CLERK OF POLICE.)					
COMMISSIONERS—(See INVENTORY—DOWER—PARTITION.)					
COMMISSIONS—(See COMPENSATION—DEPOSITION.)					
COLLECTOR—(See ADMINISTRATOR <i>ad colligendum.</i>)					
when appointed, and his duties,	-	-	-	-	249
COMPENSATION—of executors and administrators,	-	-	-	-	353, 356
general rule,	-	-	-	-	353, 354
when retained,	-	-	-	-	354
on lost property,	-	-	-	-	354, 355

COMPENSATION— <i>continued</i> —on proceeds of land,	-	355
on legacies,	-	355
for finishing growing crop,	-	355
of two executors, retainer	-	355-6
not allowed to dishonest executor,	-	356
how, when executor keeps no account,	-	356
CONTEST—of will,	-	202
proceedings in,	-	202
of claim, by executor,	-	359
CONTRIBUTION—by life legatee,	-	195
by co-devisee,	-	198
by legatees,	-	189, 190
by widow for redemption,	-	377, 398
CONVEYANCE—(See SALES—GUARDIAN & WARD—DOWER.)		
by administrator in pursuance of title bond,	-	11
CONTINUANCES—of time for report of commissioners,	312,	316
“ for inventory,	-	260
COPARCENERS—(See JOINT-TENANTS, and PARTITION.)		
dower in lands held by,	-	380
division between,	-	434, 440
COPIES—of record of superior court, establishing will,	-	207
to what court returned,	-	207
authenticated copy of will, evidence,	-	208
and see note to page		215
as to copy of foreign will,	-	81-86
of inventories and appraisements,	-	261
of bond of clerk,	-	459
of records of board of police,	-	461
COSTS—on trial of issue referred,	-	23
how payment enforced,	-	24
in supreme court, when given and how enforced,	-	40
when administrator entitled to,	-	362, 365
when widow entitled to, on petition for dower,	-	391
COUNTY COURT—jurisdiction of,	-	6, 443, 444
COUNTY AND PROBATE COURT—(See COUNTY COURT.)		
CREDITORS—when appointed executor,	-	272
cannot sue in probate court,	-	9, 10
exceptions to this rule,	-	11
may appeal, when	-	29, 30, 31
when entitled to administer,	-	236
oath in proof of claims,	-	306, 307, 345
examination of,	-	314
presentation by,	-	309, 358, 359
notice to,	-	310

CREDITORS—*continued*:

(See LIMITATION.)

in case of insolvency,	-	-	-	-	312
distribution among,	-	-	-	-	312
remedy of and proof by,	-	-	-	312, 313,	320
where debt is not due,	-	-	-	-	313

(See INSOLVENCY.)

payment to,	-	-	-	-	323, 327
DAMAGES—in action by distributees,	-	-	-	-	431
by legatees,	-	-	-	-	431
on petition for dower,	-	-	-	387, 390,	391
clerk liable for,	-	-	-	-	462
DEBTS—payment of—order of,	-	-	-	323, 326,	8
when not due,	-	-	-	-	313
proof of,	-	-	-	306, 7, 14,	345
what allowed in administrator's account,,	-	-	-	329,	332
DECREES—when final and conclusive—note to	-	-	-	2 to 3	
“ “ “ “ “ “	-	-	-	3 to 9	
“ “ in Mississippi,	-	-	-	6 to 9	
how enforced,	-	-	-	24-25	
of allowance of administrator's account, effect of,	-	-	-	334-5	
DECREASE OF PROPERTY—see Howard & Hutchinson,	-	-	-	414	
(See INVENTORY.)					
DEFAULTERS—(See DEVASTAVIT.)					
DEPOSITIONS—in plenary proceedings how taken,	-	-	-	23	
where witness resides abroad,	-	-	-	201	
what to prove respecting will,	-	-	-	201	
cumulative, when	-	-	-	201, 203	
DEPUTIES—may be appointed by clerk,	-	-	-	444	
oath—and authority of,	-	-	-	444	
DESCENT—what,	-	-	-	-	
as to what land it shall take effect,	-	-	-	416	
seizin necessary—actual or constructive,	-	-	-	416	
right of entry not sufficient,	-	-	-	417	
notoriety of possession required,	-	-	-	417	
canons of descent—which abolished,	-	-	-	417	
“ “ which retained,	-	-	-	417-18	
representation, per stirpem,	-	-	-	418	
collateral,	-	-	-	419, 421	
statute of in Mississippi,	-	-	-	421	
what descends,	-	-	-	422	
to whom it may descend,	-	-	-	423	
as between husband and wife,	-	-	-	424-5	
partition of lands descended,	-	-	-	433	

DEVASTAVIT—what constitutes,	-	-	-	340, 348
requires fraud or gross negligence,	-	-	-	340
in payment of inferior debts,	-	-	-	340-1
when administrator discovers new debts, how	-	-	-	342
by loss of debts,	-	-	-	342-3-4
compromise of debt,	-	-	-	343-4
by paying debts for which estate is not liable,	-	-	-	344
how if barred by limitation,	-	-	-	345, 357-8
by sale of goods, when,	-	-	-	346
by placing assets in trade,	-	-	-	346
by making distribution or paying legacies, when	-	-	-	346-7
DEVISES—(See WILLS, and ESTATES.)				
void, what	-	-	-	145, 15
when the same estate would descend as is devised,	-	-	-	145, 146
against the reason and policy of the law,	-	-	-	146, 154, 158
“ as for perpetuity,	-	-	-	146, 147
“ for uncertainty of person or thing,	-	-	-	147, 148
“ by death of devisee,	-	-	-	148
when lapsed, to whom it will go,	-	-	-	148, 150
“ for repugnancy,	-	-	-	150, 151
good when—condition being void,	-	-	-	151
void when—condition being valid,	-	-	-	151, 152
dying without issue,	-	-	-	152, 154
division of devised premises,	-	-	-	132-3
DEVISAVIT VEL NON—issue referred,	-	-	-	24-25
to contest will,	-	-	-	202
referred to circuit court,	-	-	-	202
new trial of,	-	-	-	202
certificate of witnesses below, how far evidence,	-	-	-	202
judgment on must be in probate court,	-	-	-	25
verdict in circuit court, how certified,	-	-	-	25
DISQUALIFICATION—of judge of probate,	-	-	-	446
of judge, when attorney at law,	-	-	-	446
“ when a relation of the deceased,	-	-	-	446, 447
“ when executor, administrator, or guardian,	-	-	-	
before being appointed judge,	-	-	-	447
“ of executor,	-	-	-	216, 217
DISTRIBUTEES—petition by,	-	-	-	429, 430
parties to, and statement in,	-	-	-	430
at the expiration of twelve months,	-	-	-	429
rule granted by court,	-	-	-	430
refunding bond when required, when not,	-	-	-	430
petition must allege tender of bond,	-	-	-	430
order for distribution immediate,	-	-	-	430

DISTRIBUTEES—*continued*:

if after settlement, must so allege,	- - -	430
set-off, or deduction from,	- - -	430
judgment for damages,	- - -	431

DISTRIBUTION —statute of in Mississippi,	- - -	425-6
of surplusage, after payment of debts,	- - -	426
advancement brought into hotchpot,	- - -	426
rule to be observed in distribution,	- - -	426
division how made,	- - -	433

DIVIDEND —in case of insolvency,	- - -	312, 313
---	-------	----------

DIVISION OF LANDS—(*See* **JOINT-TENANTS**—**PARTITION.**)

DOCKET —of all cases to be kept, in their order,	- - -	20
of board of police,	- - -	458

DONATION CAUSA MORTIS—(*See* **LEGACY.**)

DOWER —what,	- - -	372, 373
who entitled to,	- - -	373, 376
of what,	- - -	376, 380
according to what value,	- - -	380, 389
as against the heir,	- - -	380, 381
the alienee;	- - -	381
how assigned,	- - -	381, 391
petition for,	- - -	381, 382
quarantine, what	- - -	382, 383
widows' rights till assignment,	- - -	382
who must assign, and how,	- - -	382
writ of admeasurement,	- - -	383
quantity and quality,	- - -	384
jurisdiction of dower,	- - -	384
when by metes and bounds,	- - -	385
how, where property is indivisible,	- - -	385, 386
assignment must be absolute,	- - -	386
must be of the entire value,	- - -	386
of proceeds of slaves, rents and profits,	- - -	387
must be of the whole inheritance,	- - -	387
when widow entitled to recover rents,	- - -	387, 390
“ “ mesne profits,	- - -	387
“ “ damages,	- - -	387, 390-1
against whom petition may be filed,	- - -	387-9
description of land in petition,	- - -	389, 390, 391
appointment of commissioners,	- - -	390
when widow entitled to interest,	- - -	391
how barred,	- - -	391, 404
by determination of the estate and eviction,	- - -	392
by elopement, divorce, and detaining title deeds,	- - -	392

DOWER—*continued*:

by fine or common recovery,	- - - -	392
refusing to return to her husband, and afterwards living		
in adultery,	- - - -	392
by jointure, or collateral satisfaction,	- - - -	393
election when and how made,	- - - -	394, 8
by relinquishment,	- - - -	398, 403
by other acts,	- - - -	402
in personal estate,	- - - -	404, 405
according to what law,	- - - -	405, 412
of dower, generally,	- - - -	412, 415

DWELLING-HOUSE—widow entitled to,	- - - -	381-2
-----------------------------------	---------	-------

ELECTION OF JUDGE—	- - - -	441
of clerk,	- - - -	441

ELECTION—doctrine of—(See DOWER.)

EMBLEMENTS—(See ASSETS.)

ESTATES IN TAIL—effect of a devise of,	- - - -	121, 128
in remainder—contingent,	- - - -	128, 132
by executory devise,	- - - -	132, 133
in remainder, vested,	- - - -	134, 137
on condition, precedent and subsequent,	- - - -	137, 140
“ “ effect of,	- - - -	140, 142
“ “ when payable,	- - - -	142, 144

EXCEPTIONS—	- - - -	316-17
to report of insolvency,	- - - -	312
to account of executor or administrator,	- - - -	332

EXECUTION— <i>fieri facias</i> on decree,	- - - -	24
attachment vs. the person,	- - - -	25
for costs,	- - - -	23-24

(See PROCESS.)

not to issue on judgment obtained after report of insolvency,	- - - -	313
---	---------	-----

EXECUTORS & ADMINISTRATORS—

not liable for costs on appeal,	- - - -	40-41
“ nor for interest, generally,	- - - -	41, 347
may compromise a claim,	- - - -	342, 344
allowed credit for lost debts when,	- - - -	345
may surrender letters,	- - - -	221
how far they represent the deceased,	- - - -	223, 224
difference between before probate,	- - - -	225
where appointed and qualified,	- - - -	233, 8
bond of,	- - - -	238, 341
“ breach of bond by,	- - - -	241-2
“ action on, against,	- - - -	242-3-4

EXECUTORS & ADMINISTRATORS—*continued*:

revocation of their letters,	- - -	245
" of adm'r. residing out of state,	- - -	245
on petition of sureties,	- - -	246
for failing to exhibit inventory,	- - -	246
(See REVOCATION.)		
actions by,	- - -	366
EXECUTOR—who may be,	- - -	216, 217
how appointed and qualified,	- - -	217, 218, 231
where two are named,	- - -	218
his refusal, how	- - -	218, 219
when presumed,	- - -	219
cannot refuse after administering,	- 219, 220, 232, 233	
nor after taking oath,	- - -	220
if he refuses and adm'r. is appointed, he cannot after-		
wards accept,	- - -	220
otherwise after adm'rs. death,	- - -	220
where one of several renounces,	- - -	220, 221
cannot assign,	- - -	221
may surrender, how	- - -	221, 222
his interest in testator's goods,	- - -	222, 223
what rights and conditions,	- - -	223, 224
his interest before probate,	- - -	224, 225
" in Mississippi,	- - -	225
<i>de son tort</i> , what?	- - -	226, 228
is a question of law, not of fact,	- - -	228
intermeddling with land, what	- - -	228
subsequently qualifying as administrator, effect of	- - -	229
liability and defence of,	- - -	229, 230
provisions respecting adm'rs. extended to	- - -	258
EXHIBITS—by executors & administrators, in proof of payment,		327-8
how authenticated,	- - -	306, 345, 358
EVIDENCE—of claims against decedent, what	- - -	306, 345
of judgment and decree,	- - -	306, 345
specialty, bond, note, or bill,	- - -	307, 345
rent,	- - -	307, 345
open account,	- - -	307, 308, 345
will justify payment by adm'r.	- - -	308
not necessary to presentation,	- - -	308
by guardian,	- - -	503
FEEES—administrators liable for to officers,	- - -	364
entitled to counsel fees paid, when	- - -	364, 330-1
of judges and clerks of probate,	- - -	442, 451-2-3
for extra services of,	- - -	462

FEME COVERT—what property of hers is assets in the hands	
of her husband,	275, 281
relinquishment by of dower,	398, 401
right of inheritance,	423-4
distributive share of personalty,	411-12
paraphernalia,	412
FOREIGN ADMINISTRATION—effect of,	211, 212
power conferred by,	212, 213
cannot withdraw assets without paying debts,	213
where assets are <i>in transitu</i> ,	213, 214
duties of,	214
ancillary administration to,	214, 215
GUARDIAN AND WARD—by will,	466
guardian must appear, accept and give bond,	466
unless otherwise directed by deed or will,	466
consequence of neglect,	466-7-8
appointment by court,	467
entitled to property of ward,	468
inventory required of,	468
annual account by,	469, 470
failure to render,	469
waste not to be committed by,	469
may cultivate, or lease, how	469
expenditure for ward,	469, 470
sale of ward's property,	470
when to give additional security,	470, 474
on failure, what	471
power of guardian, when to cease,	471, 467
of lunatic, idiot, person non compos, &c.	471
to give bond,	471
power and control of,	471
duties of such guardian,	472
when guardianship to cease,	472
oath of every guardian,	472
non-resident guardians,	473
non-resident ward,	473
of bastards,	473
duties of executors & adm'rs. transferred to guardian,	474
not to remove property of ward,	475
when non-resident guardian may remove it,	475
GAURDIAN AD LITEM—	
appointed where guardian resides abroad,	22
GUARDIANSHIP—	466, 503

(See GUARDIAN & WARD.)

HABEAS CORPUS—	-	-	-	-	-	500
HALF-BLOOD—may inherit, when	-	-	-	-	-	419
HOTCH-POT—advancement to be brought into the estate,	-	-	-	-	-	426
(See DISTRIBUTION, and ADVANCEMENT.)						
HEIRS—signification of,	-	-	-	-	-	415
who may be,	-	-	-	-	-	416
of ancestor last seized,	-	-	-	-	-	416, 417
collateral,	-	-	-	-	-	416, 419, 420
legitimacy of,	-	-	-	-	-	420, 421
(See DISTRIBUTION.)						
HINDS COUNTY, 447—time of holding court in,	-	-	-	-	-	455
board of police may appoint fit person to transcribe	-	-	-	-	-	
certain papers,	-	-	-	-	-	447, 448
IDIOTS, LUNATICS, AND PERSONS <i>non compos mentis</i> .	-	-	-	-	-	
guardianship of,	-	-	-	-	-	471
on whose application,	-	-	-	-	-	471
jury of inquisition,	-	-	-	-	-	471
certificate of lunacy,	-	-	-	-	-	471
care of their person and estate,	-	-	-	-	-	471
inventory of their effects,	-	-	-	-	-	471
account by guardian of,	-	-	-	-	-	471
bond and security by guardian,	-	-	-	-	-	471
duty of guardian—oath,	-	-	-	-	-	472
when restored to reason,	-	-	-	-	-	472
INFANCY—(See GUARDIAN & WARD.)	-	-	-	-	-	
contract by,	-	-	-	-	-	493
when void, and voidable,	-	-	-	-	-	494
recognition and affirmance of, after age of 21,	-	-	-	-	-	495
maintenance of,	-	-	-	-	-	495
INFANTS—(See GUARDIAN & WARD, and INFANCY.)	-	-	-	-	-	
sale of their lands,	-	-	-	-	-	497, 498
of personalty,	-	-	-	-	-	497, 498-9
lease of their land,	-	-	-	-	-	488
habeas corpus,	-	-	-	-	-	500-1
INCREASE—commissions on,	-	-	-	-	-	354, 355
of property inventoried—How. & H.	-	-	-	-	-	402
INQUISITION—of lunacy,	-	-	-	-	-	471
INSOLVENT ESTATES—when,	-	-	-	-	-	311, 313, 315, 316
proceedings of administrator,	-	-	-	-	-	311, 323
account and statement,	-	-	-	-	-	311
commissioners appointed,	-	-	-	-	-	311, 312
notice by,	-	-	-	-	-	316
duty of commissioners, and report of,	-	-	-	-	-	312, 313
proceedings of, and time of report,	-	-	-	-	-	316, 322

INSOLVENT ESTATES—*continued*:

compensation of,	-	-	-	-	-	312
distribution of estate,	-	-	-	-	-	312
exceptions to report,	-	-	-	-	312, 316,	317
re-opening commission,	-	-	-	-	-	321
reference of to referees,	-	-	-	-	-	312
no suit against adm'r. for nine months,	-	-	-	-	312,	317
nor after report of insolvency,	-	-	-	-	-	313
exception to this rule,	-	-	-	-	-	313
effect of generally,	-	-	-	-	317,	320
consent of creditor to have claim settled by law,	-	-	-	-	-	313
creditor failing to prove claim before commissioners' board,	-	-	-	-	-	313
remedy of such creditor,	-	-	-	-	320,	321
suit before insolvency, proceedings in,	-	-	-	-	-	313
where debt is not due,	-	-	-	-	-	313
power of commissioners,	-	-	-	-	-	313
on failure to report, time extended,	-	-	-	-	-	313
may be compelled to report,	-	-	-	-	-	313
INTEREST—when administrator liable for,	-	-	-	-	347,	360-2
when widow entitled to,	-	-	-	-	-	391
when guardian chargeable with,	-	-	-	-	-	502
INVENTORY—						
when required of executor, adm'r. and guardian,	-	-	-	-	259, 262,	468
appraisers appointed, warrant,	-	-	-	-	-	259
oath of, to be annexed to warrant,	-	-	-	-	259,	260
proceedings of,	-	-	-	-	-	260
when evidence,	-	-	-	-	261,	264
subsequent inventory, when	-	-	-	-	-	261
excused by detention of goods by collector,	-	-	-	-	-	261
if more than one executor or adm'r., who may return,	-	-	-	-	261-2	
within what time—consequence of neglect,	-	-	-	-	-	262
if no goods, no inventory,	-	-	-	-	-	262
what to be inventoried,	-	-	-	-	262,	263
real estate not to be inventoried,	-	-	-	-	-	266
may be compelled by probate court,	-	-	-	-	-	262
what will render executor or adm'r. liable,	-	-	-	-	262,	263
when liable on bond for debt due from himself,	-	-	-	-	-	263
by administrator <i>de bonis non</i> , when	-	-	-	-	-	264
action against executor or adm'r. for neglect,	-	-	-	-	-	264
damages, amount of, and when,	-	-	-	-	-	264
of increase of property—How. & H.	-	-	-	-	-	402
ISSUES—in plenary proceedings, when made up and how tried, &c.	-	-	-	-	-	23
judgment on must be by the probate court—a judgment	-	-	-	-	-	
by the circuit court is a nullity,	-	-	-	-	-	23-24

JOINT-TENANTS—partition between,	- -	434, 440
JUDGE OF PROBATE—		
may certify proof and acknowledgment of deeds whether		
the land be in his county or not,	- -	453
may solemnize matrimony,	- - -	453
may authorize ministers to solemnize marriage,	-	453
has powers of trustees of school lands,	- -	453
must supervise drawing jury, when	- -	453
may approve bonds of sheriffs as tax collectors,	-	453
other duties,	- - - -	453
when disqualified—(See DISQUALIFICATION.)		
may practice in other courts,	- - -	446
to receive applications for administration, inventories,		
appraisements, &c.	- - - -	333
to decree allowance of accounts,	- - -	333
proceedings on exception thereto,	- - -	333
jurisdiction of,	- - - -	8, 441
JUDGE AND CLERK—how elected,	- - -	441
oath, and bond,	- - - -	441
vacancy how filled,	- - - -	442
seal of court,	- - - -	442
compensation and perquisites,	- -	442, 451-3
JURISDICTION—history of.		
of the courts ecclesiastical,	- - - -	1 to 6
of courts of chancery—see note to	- - -	3 to 6
in different states of the Union—note,	- - -	2 to 4
in Mississippi, of courts of probate,	- - -	7 to 17
“ of courts of chancery,	- -	17 to 20
general rule for ascertaining when courts of probate have		
jurisdiction,	- - - -	9 to 11
exceptions to the rule,	- - - -	10 to 12
where limited, how to be exercised,	- - -	12
examples of jurisdiction of probate court,	- - -	12 to 14
objection to, how made, and when,	- -	14, 15
once exercised, is gone—and can be restored only by		
consent of parties,	- - - -	15
consent cannot give it, if not conferred by law,	-	15
nor take it away where conferred by law,	-	15 to 16
if judge disqualified, where jurisdiction vests,	-	16 to 18
powers transferred to,	- - - -	443-4, 450
court holden, where and when,	- - -	445
special term, when	- - - -	445
may issue summons for party or witness,	- -	445, 446
“ and an attachment, and imprison,	- -	446

LEGACY—what, either general or specific,	174
when general—when specific,	175
specific, kinds of, difference between,	175
“ subject of, what	175, 176
“ when specific and pecuniary,	176
“ when specific legacy is wholly lost,	177
donations <i>causa mortis</i> ,	177, 178
cumulative, when	178, 180
ademption of—what, when	180, 182
in satisfaction of a debt when,	182, 184
lapse of—disposition of,	150, 184, 185
“ when it falls into the residue,	185, 187
abatement of,	187, 190
assent to by executor,	190, 192
time of payment, when	192, 193
interest and profits on,	193, 196
action for,	196, 199, 430
“ at common law,	431
LEGATEES—entitled to same remedy as distributees,	429
(See DISTRIBUTEES.)	
judgment for, and verdict for, must give damages,	431
LETTERS—testamentary,	232
of administration,	233, 8
revocation of,	245, 8
LIMITATION—for presentation of claims,	309
requisite to,	308
effect of,	309
not to extend to legatees, &c.	309
publication of notice to present,	310
what constitutes,	310
when to commence,	310
legal notice to present, what	311
what will prevent,	356
executor and adm'r. not bound to plead,	356
acknowledgment, without promise does not remove,	357
cannot affect creditors after settlement,	357, 358
promise cannot revive a debt barred by special statute,	358
changed to two years,	358-9
claim how contested,	359
to what claims applicable,	359
to probate of will,	199
LIST—(See INVENTORY)	259
of debts sperate and desperate,	260

LOSS AND DECREASE OF PROPERTY—

commissions on,	- - - - -	354, 355
adm'r. not liable for, when—How. & H.	- - - - -	401-2

LUNATICS—(See IDIOTS, &c.)

MARINERS—excepted from the statute of wills,	- - - - -	43, 55
--	-----------	--------

MARSHALLING—(See ASSETS.)

MONEY—must be inventoried, when	- - - - -	263, 269
to be accounted for,	- - - - -	270
of wife, when assets of deceased husband,	- - - - -	275
legal assets,	- - - - -	283

NEXT OF KIN—who,	- - - - -	420
entitled to be guardian,	- - - - -	467
entitled to administer,	- - - - -	236-7
summoned to contest will,	- - - - -	232

NON COMPOS MENTIS—(See IDIOTS.)

NON-RESIDENTS—(See ABSENTEES.)

NOTICE—prerequisite to order and decree against minor,	- - - - -	22
must be personally served on his guardian,	- - - - -	22
how, if guardian absent or personally interested,	- - - - -	22
on final settlement of accounts, by publication,	- - - - -	23, 334
if parties reside beyond the limits of the state,	- - - - -	23, 332
otherwise it must be by personal service,	- - - - -	23
by commissioners of insolvency,	- - - - -	316
of auditing and reporting accounts for allowance,	- - - - -	333
of appointment of commissioners to assign dower,	- - - - -	390
of surrender of letters,	- - - - -	247
of application to sell lands,	- - - - -	295
of sale of lands,	- - - - -	295
of sale of personalty,	- - - - -	303
of grant of letters,	- - - - -	310
by commissioners of insolvency,	- - - - -	312-16
of application to sell or compromise claim,	- - - - -	343, 344
non-resident creditors,	- - - - -	358-9
non-resident feme covert,	- - - - -	399
“ being distributee,	- - - - -	405

NUNCUPATIVE WILLS—what,	- - - - -	54, 55
must be in last sickness,	- - - - -	56
at the habitation of the deceased,	- - - - -	56
witnesses to, how many,	- - - - -	56
what to be proved,	- - - - -	56, 57
when good in part,	- - - - -	58
who capable witnesses,	- - - - -	58
when proved,	- - - - -	199

OATHS—of executors,	-	-	-	-	232
of administrators,	-	-	-	-	238
accompanying inventory,	-	-	-	-	260, 468
OBJECTIONS—(See EXCEPTIONS.)					
OFFICE—of clerk of probate,	-	-	-	-	444
in which court is to be held,	-	-	-	-	448
what recorded in,	-	-	-	-	457
examination of, how made,	-	-	-	-	463
ORPHANS—(See GUARDIAN & WARD, and INFANT.)					
ORPHANS' COURT—powers transferred,	-	-	-	-	443
PARCENERS—(See JOINT-TENANTS.)					
PARTITION—of devised land,	-	-	-	-	432
of descended land,	-	-	-	-	433
of personalty,	-	-	-	-	433
between joint-tenants, &c.	-	-	-	-	434, 440
PAYMENT OF DEBTS & LEGACIES—order of,	-	-	-	-	323
priority of claims,	-	-	-	-	323, 326
what entitles creditor to payment,	-	-	-	-	358, 359
repealing and amendatory law,	-	-	-	-	358, 359
when satisfaction, when not,	-	-	-	-	352
PETITION—must contain logical statement of facts,	-	-	-	-	21
if fraud alleged, greater latitude is allowed,	-	-	-	-	21
when additional facts may be given in,	-	-	-	-	22
must not be multifarious, nor informal, nor defective,	-	-	-	-	22
all claimants must be made parties,	-	-	-	-	22
by distributees,	-	-	-	-	429, 430
by legatees,	-	-	-	-	196-9
(See DOWER.)					
PERISHABLE PROPERTY—sale of by adm'r. <i>ad coll.</i>	-	-	-	-	250
see note,	-	-	-	-	250
PERSONAL ESTATE—to be inventoried,	-	-	-	-	259
what constitutes,	-	-	-	-	265, 283
vests in executor and adm'r.	-	-	-	-	265
sale by executor and adm'r.	-	-	-	-	303-5
by guardian,	-	-	-	-	470
when exempted by will from payment of debts,	-	-	-	-	159-60, 284
first liable for debts,	-	-	-	-	284
distribution of,	-	-	-	-	425, 433
PHYSICIANS' BILLS—preferred, not over \$25,	-	-	-	-	328
PLEADINGS & PRACTICE,	-	-	-	-	20 to 26
plenary proceedings by bill and petition,	-	-	-	-	21
rules respecting same,	-	-	-	-	21, 24
when governed by rules of ecclesiastical court,	-	-	-	-	25, 26
how far equity rules prevail,	-	-	-	-	25, 26

PLEA—of special statute of limitations, by exec'r. or adm'r. how,	358
by executor <i>de son tort</i> ,	229, 231
POSTING—(See NOTICE.)	
POWER—intention must govern construction of,	166
must be equitably construed,	166
naked power confined to testator's intent,	166, 167
if coupled with an interest, more liberally,	167
may be naked as to one, and coupled with an interest as to another estate,	167
appendant, when,	167
extent of—examples,	167, 168
to sell, what included,	167, 169
in Mississippi, executor declared trustee, when	169
when probate of will necessary to execution of,	169, 170
execution of relates to date of instrument creating the power—reason of this rule,	170
to two executors, how to act,	170
when they may act separately,	170, 174
if it fails, property goes to donor's heirs,	174
execution, when good in part and void as to excess,	174
of attorney from non-resident husband or wife to execute a deed,	399
(See DOWER.)	
PREFERRED CLAIMS,	323, 328, 329
PRESENTATION OF CLAIMS—(See LIMITATION.)	
PRETERMITTED CHILDREN—rights of,	76
PROBATE AND LETTERS TESTAMENTARY—	
where made, within what time, and how,	199, 200
in what county—jurisdiction of,	200, 201
witnesses of, their proof how made,	201
within what time contested,	202
what number of witnesses required to probate,	202, 204
what witnesses must prove,	204
when probate may be set aside,	205, 206
when will may be re-propounded,	205, 206
to what court motion made,	206, 207
authentication and certificate of,	207, 208
of lost wills, how made,	208, 209
when subscribing witness is devisee,	209
who are capable witnesses,	209, 210
(See WITNESSES.)	
<i>devisavit vel non</i> , proof required,	210
of foreign wills,	81
must have seal of clerk,	442
(See EXECUTORS, and REVOCATION.)	

PROBATE COURT—(See JURISDICTION.)	
“ when held, - - -	445, 448, 449, 450, 453-7
PROCESS—may be by service or publication, - - -	23
how enforced, - - - - -	24, 25, 451
general provision respecting, - - - - -	460
of boards of police, - - - - -	460
PROOF—(See EVIDENCE.)	
PUBLICATION—(See NOTICE.)	
“ non-resident parties, - - - - -	22, 23
PURCHASE—how different from descent, - - - - -	416
PURCHASE-MONEY—lien for, - - - - -	298, 300
REAL ESTATE—charge on, what—form of, - - - - -	158, 159
“ when on whole or part, - - - - -	159, 160
“ when personal estate exempted by, - - - - -	160-61-62
“ effect of against purchasers, - - - - -	161-62
“ when of “rents & profits” as to cred- itors and legatees, effect what - - - - -	161-62
(See TRUST, and POWER.)	
RECORD—truth of not questionable, - - - - -	9
how kept, - - - - -	20
on appeal, how carried up, - - - - -	38
must show jurisdiction, - - - - -	40
of a will, - - - - -	199, 207
of foreign will, - - - - -	211
razing, penalty for, - - - - -	445
REFEREES—in case of insolvency, - - - - -	312, 317
REFERENCE—of claims against insolvent estate, - - - - -	312, 317
of issue to circuit court, - - - - -	24
of administrator's account, - - - - -	333
REFUNDING BOND, - - - - -	430
in case of distribution, - - - - -	430
on payment of legacy, - - - - -	431
REGISTER—duty of, - - - - -	442
RELINQUISHMENT—by wife, - - - - -	398, 404
(See DOWER.)	
RENUNCIATION—by wife, of dower, - - - - -	398, 404
of testamentary provision, - - - - -	398, 395
REPORT—of inventory, - - - - -	260
of sale of land by executors, - - - - -	297
contents of such report, - - - - -	305
of commissioners of insolvency, - - - - -	312
time of such report, - - - - -	316
on failure to report, what - - - - -	314
of insolvency, when - - - - -	315

REPORT—*continued*:

exceptions to, when	316
of auditors,	333
exceptions thereto,	333
of partition of land by commissioners,	437

REPUBLICATION—effect of, 77, 79, 80

form of, by codicil,	79, 80
by cancellation of a revocatory will,	80
statute of Mississippi, and rule here,	80
effect of memoranda,	81

REVOCATION—express, how 61

by a second will revoking the former,	61
contents of second will must be known,	61, 62
“ must expressly revoke the former,	62
“ must have all the solemnities of the first,	62
intention to revoke must not be imperfect,	62, 63
distinction in England between revoking & disposing will,	63
“ between wills in England and here as to personalty,	63

if second will fail, when first will not revoked,	63, 64, 75
if several parts of will, cancelling one revokes all,	64, 65
of two former wills by a third,	64
evidence of intention to revoke or not,	64, 65, 66
what constitutes cancelling or destroying,	66, 68
when actual, when presumptive,	66, 67
must be by the testator, or by his direction,	67
must be completed,	67
when a codicil revokes,	68, 69
implied, by conveying away the land,	69, 70, 71
by foreclosure of mortgage—by exchange,	71, 72
by agreement for partition,	72
when <i>pro tanto</i> ,	72, 73
reason of the doctrine,	73
by marriage and birth of a child,	73, 74, 75
by marriage only, of a woman's will,	75
by birth of child after date of the will,	76
parol proof in contradiction of, when admissible,	76, 77
of letters of administration,	246, 248
of letters testamentary,	245, 248

RULES—when courts of record may establish rules—note to 21

SALES —of land charged by will,	161
of land, under a power,	167, 174, 252
of perishable property,	251
of land by executor and adm'r.	285, 303

SALES—*continued*:

of personalty,	303, 305
by guardian,	470
of lands for division thereof,	433
must be strictly pursued,	285, 286
authority by court of probate,	286, 287
to be strictly pursued,	287, 288
may be sold in parcels,	288
contract for by administrator void,	288
decendent must have been seized,	289
undevise land to be <i>first</i> sold,	289
conveyance may be to purchaser's assignee,	289
authority must appear on the deed,	289, 290
of the deed by administrator, &c.	290, 291
defect of title, no defence,	291
administrator's title in the premises,	291
purchase by administrator at his own sale,	291, 293
probate court may vacate, when	293
legislature may order sale,	293, 294
condition of law to be strictly fulfilled,	294
under statute of Mississippi,	294, 297
proceedings under,	297, 299
when void,	299, 301
examples, &c.	301, 303
proceedings at such sale,	303, 305

SCHEDULE—(See INVENTORY.)

of debts sperate and desperate,	260
on reporting insolvency of estate,	286, 311
of slaves,	414, 415

SEAL—of the clerk of probate,	442
not necessary to a will,	43
when destruction of impairs will,	66

SECURITY & SURETY—may have counter security,	248, 474
on administration bonds,	239, 241
action against,	242, 244
on bond for sale of property,	295, 297
on guardian's bond,	468
on appeal bond,	27-30
on clerk's bond,	457, 458

SETTLEMENT—(See ACCOUNT.)

SET-OFF—by administrator, executor, &c.	348, 352
against them,	351, 352
of purchase by distributee, against his share,	430

SHERIFF—when to administer,	- - - - -	365-6
to administer oath, when	- - - - -	384
to set off dower,	- - - - -	384
to summon commissioners,	- - - - -	383
SLAVES—emancipation of by devise,	- - - - -	154, 158
manumission of, by an infant,	- - - - -	491-2, 495
list of, when held for life,	- - - - -	414-15
SOLDIERS—(See MARINERS.)		
infants may be,	- - - - -	494
SPECIAL TERM—of probate court,	- - - - -	445
SUMMONS—to executor failing to inventory,	- - - - -	246
may be attached,	- - - - -	247
(See PROCESS.)		
SURRENDER—of letters testamentary or administration,		247
SURVEYS—on partition of land,	- - - - -	436
TENANT IN COMMON—(See JOINT-TENANT.)		
TENURE OF OFFICE—of judge and clerk,	- - - - -	441
TERMS OF COURT,	- - - - -	445, 458
TESTAMENTARY LETTERS—(See PROBATE, and EXECUTORS.)		
TESTAMENTARY GUARDIAN—(See GUARDIAN & WARD.)		
TITLE—not warranted on sale by executor,	- - - - -	291
to decedent's goods vests in executor and adm'r.	- - - - -	222-5
TRUST—what? how created in a will,	- - - - -	163
must be certain as to the <i>thing</i> and <i>object</i> ,	- - - - -	163, 164
how descendible,	- - - - -	164
effect of against third persons,	- - - - -	164, 165
resulting, when? and to whom?	- - - - -	165
trustee cannot make profits on,	- - - - -	165, 166
VACANCIES—in office of clerk, how filled,	- - - - -	442
WARD—(See INFANT.)		
WARRANT OF APPRAISEMENT—(See INVENTORY.)		
WASTE—by guardian,	- - - - -	499
by widow,	- - - - -	414, 415
WILLS—what? and how executed at common law,	- - - - -	41, 42
“ by statute,	- - - - -	43
where written wholly by testator,	- - - - -	43
need not have a seal,	- - - - -	43
when <i>mark</i> sufficient,	- - - - -	44
how to be signed, and in what part,	- - - - -	44, 45, & notes.
imperfect signature, effect of,	- - - - -	45, 46
form of will, and intention,	- - - - -	46, 49
when proof required that will was read, and when the		
fact presumed,	- - - - -	49
if not wholly written by testator, how?	- - - - -	49, 50

WILLS—*continued*:

when good as to personalty, tho' not as to realty,	-	50
signature of, how? and acknowledgment,	-	50, 51
attestation of—how, when, and where,	-	52, 53
publication how made,	-	53, 54
nuncupative wills,	-	54, 58
codicil, what and how executed,	-	59, 61
revocation of wills, express,	-	61, 69
“ “ implied,	-	69
who incapable of making a will,	-	87, 92
who may be devisees,	-	92, 94
sanity of testator,	-	94, 100
“ “ what proof of admissible,	-	100, 101
what proof of fraud admissible,	-	101, 103
“ duress	-	101, 103
“ undue influence,	-	101, 103
what embraced in,	-	104
after acquired lands when embraced,	-	104, 105
what may be devised, real and personal,	-	105, 107
construction of—		
“ as to <i>date</i> when testator speaks,	-	107
“ intention of testator to govern,	-	108
“ how ascertained,	-	108, 112
“ as to quantity of estate,	-	112, 116
“ statutes and effect of,	-	116, 117
“ rules of generally,	-	117, 121
WILLS, FOREIGN—how proved in Mississippi,	-	81
according to what law executed,	-	82
what law governs as to personalty,	-	82
“ as to real estate,	-	82
effect of in different states,	-	83
by what law interpreted,	-	83
from what date it has effect,	-	83
when evidence without probate,	-	84
authentication of,	-	84, 86
WITNESSES—of a will, how testimony taken,	-	201, 204
what they may prove,	-	204, 210
of a lost will,	-	209
when devisee, how qualified,	-	209
who capable,	-	209, 210, 257



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